(1)

No. ____

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

—against—

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a $15 million punitive damage award—rendered when a New York appellate court *increased* the trial court judgment of $10 million—is unconstitutionally arbitrary and excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), where, as here:

a. the New York appellate court failed to engage in exacting appellate review or to apply the constitutional "guideposts" designed to ensure the $15 million punitive damages award was reasonable and proportional;

b. the New York appellate court based its decision to increase punitive damages on two factors supposedly showing that Petitioners had "immense" wealth, even though the trial court had found that Respondents failed to submit evidence concerning Petitioners' supposed wealth, and even though considering wealth as a surrogate for a Due Process review is impermissible;

c. the award greatly exceeds the amount of civil penalties that could be imposed under relevant state law;

d. the New York appellate court failed to apply the factors for determining whether the Petitioners' actions were reprehensible; and

e. the award is nearly five times substantial compensatory damages.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Hirokuni Honzawa, an individual, and Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation (the "Corporate Petitioners"), each privately-held corporate entities owned directly by four corporations organized and existing in Japan, and in turn wholly-owned by Hirokuni Honzawa. The Corporate Petitioners own varying percentages of the following companies: Hiro Investments, LLC, 655 Property, LLC, 100 Property, SPE LLC, 100 Property Associates, LLC, 100 Property, LLC, Takara Holding, LLC, Takara Associates, Inc., 617 Property, LLC, and 39 AF Property, LLC. None of these entities are publicly held, and none are owned in whole or in part by any other corporate entity other than the Corporate Petitioners.

Respondents Mitsuhiro Honzawa and Yukiko Honzawa are individuals.

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Petitioners Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The post-trial order dated August 15, 2002, and the final Judgment, entered September 12, 2002 of the Supreme Court of the State of New York, County of New York, are attached at Pet. App. 18a and 8a respectively. The order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department, dated October 21, 2003, is attached at Pet. App. 4a and reported at *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29 (1st Dep't 2003). The order of the Court of Appeals of the State of New York dismissing appeal, dated December 23, 2003, is attached at Pet. App. 1a and reported at *Honzawa v. Honzawa*, 1 N.Y.3d 564, 2003 WL 23144905 (N.Y. 2003).

JURISDICTION

The Court of Appeals of the State of New York dismissed Petitioners' appeal as of right from an order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department on December 23, 2003. (Pet. App. 4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[1] Petitioners file this Petition from the Court of Appeals' final order of dismissal.

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[1] Subsequent to the Court of Appeals' dismissal, Petitioners filed a motion for permission to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5602(a). The motion remains pending.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

"[N]or shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

1. This malicious prosecution case presents the latest example of a State appellate court's refusal to engage in the exacting *de novo* review of a trial court's punitive damages award dictated by this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).[2] The New York appellate court here *increased* punitive damages from $10 million to $15 million based upon Petitioner Hirokuni Honzawa's alleged, but unproven, "immense" wealth. (Pet. App. 6a.) In increasing punitive damages, the New York appellate court failed to consider the reprehensibility of the Petitioners' actions, the proportionality of the award to the Respondents' harm, or the proportionality of the award to similar civil penalties—all factors this Court identified as crucial to ensure adherence to the due process requirements of reasonableness and proportionality. The

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[2] Since *State Farm*, other such instances in which this Court remanded a punitive damages award for further, *de novo* review include *Philip Morris USA Inc. v. Williams*, 124 S. Ct. 56 (2003); *Cass v. Stephens*, 123 S. Ct. 2213 (2003); *Ford Motor Co. v. Ramon Romo*, 123 S. Ct. 2072 (2003); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Textron Financial Corp.*, 123 S. Ct. 1783 (2003); *San Paolo U. S. Holding Co., Inc. v. Simon*, 123 S. Ct. 1828 (2003); *Key Pharmaceuticals, Inc. v. Edwards*, 123 S. Ct. 1781 (2003); and *Anchor Hocking, Inc. v. Waddill*, 123 S. Ct. 1781 (2003).

appellate court also refused to consider that the compensatory damages awarded, consisting of emotional distress and legal fees, were themselves inherently punitive. The award is believed to stand as the *highest punitive damages award* for malicious prosecution in New York State, in an action in which there was no arrest or physical injury.

2. The origins of this case lie in a broader business dispute relating to ownership of certain Japanese-based real estate and warehousing companies—a dispute ultimately resolved in Japan in favor of Petitioner Hirokuni Honzawa ("Hirokuni"). By way of background, in 1978, Hirokuni had entrusted responsibility to Mitsuhiro Honzawa ("Mitsuhiro"), his younger brother, to deposit certain corporate funds in bank accounts in Hong Kong. The corporate funds remained in Hong Kong until a dispute arose in late 1994 between Hirokuni and Mitsuhiro over, among other things, Mitsuhiro's mismanagement of the Corporate Petitioners' real estate holdings in the United States and false claims of ownership of the Japanese companies, including through his Japanese counsel, Mr. Maruyama. In September 1995, Hirokuni received information that Mitsuhiro had secretly misappropriated $2.4 million from the Hong Kong bank accounts while Hirokuni was hospitalized with a heart condition. In November 1995, Mitsuhiro was terminated from all positions by the companies.

All of the above events preceded the lawsuit upon which this malicious prosecution action is based. Therefore, these events are irrelevant in establishing any damages that could have resulted from such lawsuit.

3. After he was terminated from the Japanese companies, Mitsuhiro commenced a series of lawsuits in Japan (Mitsuhiro's "Japanese Actions"). In the Japanese Actions, Mitsuhiro sought, among other things, a dec-

laration that he shared ownership of the Japanese companies equally with Hirokuni.

4. Believing that the misappropriated $2.4 million included corporate funds of Petitioner Takara International, Inc. ("Takara"), and believing some of the moneys had been deposited in a New York bank account, Hirokuni thereafter caused Takara to commence an action for replevin in Supreme Court of the State of New York, County of New York (the "Prior Action"). Takara also obtained an attachment of the New York account funds in the amount of $250,000. The case was removed to the United Stated District Court for the Southern District of New York where, after a seven-day trial, the court denied Takara's claim, and deferred judgment to allow the parties to negotiate damages against Takara for wrongful attachment under state law. The parties negotiated a damages award of $550,000, and a judgment against Takara was entered.

5. Mitsuhiro and his wife Yukiko thereafter commenced the present malicious prosecution action against Takara and sixteen other individuals and entities seeking billions of dollars in punitive damages. Because the lawsuit was based only on the Prior Action—not the entire business dispute—Mitsuhiro had to premise his demand for compensatory and punitive damages upon harm resulting only from the Prior Action. (Pet. App. 51a-53a.) This he did not and could not do. However, he made much broader allegations that he was an "owner" and "principal" of the Japanese companies (an assertion later ruled false by the highest Japanese court) and that the alleged reputational harm caused by the Prior Action was used as reason to "oust" him from the companies.[3]

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[3] It is undisputed that prior to the date on which the Boards resolved to terminate Mitsuhiro as an officer and director of each of the companies, he had delivered a written resignation, which he

Indeed, at the trial of this action, Mitsuhiro asserted to the jury that the "allegations of theft" in the Prior Action were made as a "basis for terminating his employment" and to "try and seize control" of the Japanese businesses by "using this case and allegations in this case" to ruin his reputation. Founded upon this theory, Mitsuhiro asked the jury to "impose punitive damages." (Pet. App. 56a-61a.)

6. However, Mitsuhiro conceded that he was terminated from his employment *before* the Prior Action was commenced, and he did not offer any other evidence of harm to his reputation relating to the Prior Action. (Pet. App. 23a, 51a-53a.) The trial court, accordingly, ruled that Mitsuhiro had failed to meet his burden of proving direct economic or reputational harm resulting from the Prior Action. *Id.* The jury was nevertheless apparently ignited by a belief that Mitsuhiro had been treated unfairly, and awarded him as compensatory damages $1,148,763 owed to Mitsuhiro's American attorneys, $691,667 owed to his Japanese attorneys, $1,131,250 for alleged emotional distress, $900,000 in lost consortium, and *$50 million* in punitive damages. (Pet. App. 19a.)

7. Petitioners challenged the $50 million punitive damages award and requested that the trial court conduct a *de novo* review of the award under the "guidepost" analysis set forth in this Court's decisions in *BMW* and *Cooper*. Petitioners also challenged the emotional distress and lost consortium damages as unsubstantiated by the evidence. The trial court offered remittitur of punitive damages to $10 million, and vacated the emotional distress and lost consortium awards, leaving attorneys fees as the only allowable compensatory damages. (Pet. App. 27a.)

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alleged he thereafter withdrew. The Japanese Courts have since ruled the termination lawful.

8. Shortly after the trial court entered the Judgment in this case, the Tokyo High Court rejected Mitsuhiro's assertion in the Japanese Actions that he was an owner of the Japanese companies. The Tokyo High Court confirmed that Hirokuni had previously acquired ownership and was the sole owner of the Japanese companies. Mitsuhiro's claim was characterized as being "without any ground." The Tokyo High Court's ruling was subsequently affirmed by the Japanese Supreme Court.

9. On appeal from the trial court's judgment in the present case, Petitioners argued that the $10 million in punitive damages was "excessive," and violated Petitioners' due process rights. (*See* Pet. App. 3a.) In particular, Petitioners asserted that the trial court, in making its remittitur decision, had failed to apply properly the constitutional guideposts set forth in *BMW*, *Cooper*, and *State Farm*.

On October 21, 2003, the Appellate Division *increased* punitive damages to $15 million, without engaging in the requisite *de novo* review and without applying the guideposts mandated by this Court in *BMW*, *Cooper*, and *State Farm*. (Pet. App. 6a.) Contrary to *State Farm*, the Appellate Division instead pointed to Hirokuni's purported wealth as the principal factor in evaluating punitive damages—namely, the "the immense value of the family businesses" owned by Petitioner and his ability to pay "millions" in legal fees. (Pet. App. 6a.) The Appellate Division also reinstated the emotional distress and lost consortium awards. (Pet. App. 6a.)

10. Petitioners filed an appeal as of right to the Court of Appeals of the State of New York on constitutional grounds. (Pet. App. 37a.) The Court of Appeals dismissed the appeal on the jurisdictional ground that the punitive damages award did not constitute a "substantial" constitutional question on appeal. (Pet. App. 1a.)

Thereafter, Petitioners filed a motion for leave to appeal to the Court of Appeals of the State of New York on all issues. The motion is currently pending.

REASONS FOR GRANTING THE PETITION

In *BMW*, and thereafter in *Cooper* and *State Farm*, this Court ruled that due process forbids "grossly excessive or arbitrary" punitive damage awards. To guarantee due process, the Court in *State Farm* directed all appellate courts to engage in "[e]xacting appellate review" to "ensure both reasonableness and proportionality" in punitive damages awards. 123 S. Ct. at 1525-26. *State Farm* requires courts to consider three "guideposts" first set forth in *BMW*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 1520; *accord BMW*, 517 U.S. at 575; *see Cooper*, 532 U.S. at 440. In virtually every respect, the Appellate Division failed to follow the dictates of *BMW*, *Cooper*, and *State Farm*. And its decision to increase punitive damages to $15 million cannot be reconciled with those dictates.

I. THE APPELLATE COURT FAILED TO CONSIDER THE DISPARITY BETWEEN THE HARM SUFFERED AND THE PUNITIVE DAMAGES

In *State Farm*, the Court stated that, based upon its "jurisprudence and the principles it has now established, . . . few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. Moreover, while a higher ratio may be warranted where

"a particularly egregious act has resulted in only a small amount of economic damages," the opposite is true where "compensatory damages are substantial." *Id.* When "substantial"—as with the $1 million compensatory damages award in *State Farm*—"then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). Indeed, this "ratio" guidepost ensures due process by requiring a reasonable proportion to the "harm to the victim caused by the defendant's actions." *Cooper*, 532 U.S. at 435.

The Appellate Division failed to consider whether the $15 million to which it *increased* punitive damages bore a reasonable relationship to compensatory damages, as both *State Farm* and *BMW* require. Here, the economic harm that Mitsuhiro set out to establish was harm to his reputation which caused him to be "ousted" from ownership of the Japanese companies. (Pet. App. 6a.) Mitsuhiro was incapable of proving economic harm, and his claim was precluded, because he failed to proffer *any* evidence of a failed reputation, much less a failed reputation caused by the Prior Action. (Pet. App. 51a-54a.) Indeed, Mitsuhiro was terminated from his employment *before* the Prior Action was commenced, and his alleged ownership interest in the Japanese companies was adjudged "without any ground" by the Japanese courts.

Mitsuhiro's compensatory damages, accordingly, were limited to attorneys fees incurred in the Prior Action, and emotional harm and lost consortium relating to his involvement in the Prior Action. (Pet. App. 6a.) As in *State Farm*, the compensatory damages awarded were a "substantial" $3,171,670. The $15 million punitive damages award is almost *five times* compensatory damages—well in excess of the "equal" ratio to compensatory damages that *State Farm* considered the potential "out-

ermost limit of the due process guarantee" where, as here, compensatory damages are "substantial." 123 S. Ct. at 1524.

The Appellate Division exacerbated its error by further failing to consider the portion of the compensatory damages that were by their nature punitive. In *State Farm*, the Court explained that the "compensatory damages for the injury suffered here"—emotional distress—"likely were based on a component which was duplicated in the punitive award." 123 S. Ct. at 1525. Indeed, as with Mitsuhiro in the present case, the distress in *State Farm* was caused by the "outrage and humiliation the [plaintiffs] suffered at the actions of [the defendant]; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element." *Id.* As with the Utah courts in *State Farm*, the Appellate Division's failure to consider the punitive component of emotional distress and lost consortium damages resulted in a punitive damages award that is duplicative.[4]

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[4] The Appellate Division also failed to consider that the award of attorneys fees also includes a component that is, by its nature, punitive. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (courts may impose an award of attorneys fees "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons") (citations omitted); 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Indeed, under the "American Rule," fee shifting in litigation is ordinarily prohibited, with limited exception to compensation awarded under statutory enactments relating to private attorneys general, or as a punitive sanction for improper judicial conduct. *See Chambers*, 501 U.S. at 45. The attorneys fees damages awarded in the present malicious prosecution action resemble the latter, punitive, component resulting in a punitive damages award that is further duplicative.

In short, and contrary to the standards of review declared in *BMW*, *Cooper*, and *State Farm*, the Appellate Division apparently made *no effort* to determine whether the $15 million to which it increased punitive damages bore a reasonable "ratio" to compensatory damages. For this reason alone, certiorari should be granted.

II. THE APPELLATE COURT FAILED TO CONSIDER THE DISPARITY BETWEEN PUNITIVE DAMAGES AND COMPARABLE SANCTIONS

Certiorari should also be granted because the Appellate Division failed to consider the "disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.' " *State Farm*, 123 S. Ct. at 1526, *quoting BMW*, 517 U.S. at 575. The reason for this guidepost is to ensure the defendant is accorded sufficient notice of the potential sanction for its actions. *BMW*, 517 U.S. at 574. In *State Farm*, the Court held that the disparity between punitive damages and the relevant civil penalty was unconstitutional, since "[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs]" was a $10,000 fine. *Id.* Thus, the Court ruled that the punitive damages award represented a constitutionally unreasonable "disparity" because the potential $10,000 sanction for the defendant's conduct was "dwarfed by the . . . punitive damages award." *Id.*

The Appellate Division refused to consider any comparable sanction to determine whether Petitioners had been accorded notice of the penalty that was ultimately imposed for their alleged conduct. The *maximum* New York "sanction" for civil litigation commenced maliciously is $10,000. NYCRR § 130-1.1, 1.2. Moreover, in the last ten years, punitive damages awards in malicious prosecution cases in New York in which there was no

arrest or incarceration-related malicious prosecution—averaged between $10,000 and $150,000. *E.g. Lynch v. County of Nassau*, 278 A.D.2d 205, 717 N.Y.S.2d 248, 249 (2d Dep't 2000) (reducing punitive damages to $50,000); *Jackson v. Kessner*, 225 A.D.2d 403, 640 N.Y.S.2d 4, 5 (1st Dep't 1996) (affirming punitive damages of $150,000); *Coker v. City of Schenectady*, 200 A.D.2d 250, 252, 613 N.Y.S.2d 746 (3d Dep't 1994) (affirming punitive damages of $40,000); *Parkin v. Cornell University, Inc.*, 182 A.D.2d 850, 851, 581 N.Y.S.2d 914, 916 (3d Dep't 1992) (reducing punitive damages to $10,000); *Hart v. City of New York*, 186 A.D.2d 398, 399, 588 N.Y.S.2d 1012 (1st Dep't 1992) (reducing punitive damages to $100,000). As in *State Farm*, the Appellate Division would not have needed to "dwell long on this guidepost" because the punitive damages awarded by the Appellate Division are *100 to 1500 times more* than applicable civil penalties and punitive damages awarded in similar cases. 123 S. Ct. at 1526.

III. THE APPELLATE COURT FAILED TO CONSIDER THE APPROPRIATE FACTORS TO DETERMINE WHETHER THE PETITIONERS' CONDUCT WAS SUFFICIENTLY REPREHENSIBLE

In *State Farm*, the Court also reiterated the factors set forth in *BMW* that the Appellate Division should have considered in determining whether the Petitioners' actions were sufficiently "reprehensible" to warrant $15 million in punitive damages. 123 S. Ct. at 1521. In the first instance, the Appellate Division failed to presume, as *State Farm* requires, that Mitsuhiro was "made whole for his injuries by compensatory damages," particularly where as here the basis for the economic harm he claimed—harm to his reputation which resulted in his ouster from the Japanese companies—was held baseless.

Id. The Appellate Division further erred in failing to consider the standards that *State Farm* and *BMW* declared for determining whether an action was reprehensible. For example:

- *State Farm* and *BMW* set as a primary factor whether "the harm caused was physical as opposed to economic." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. This action did not include a claim for physical injury, the allegations of harm to Mitsuhiro's reputation were precluded as baseless, and the economic injury was limited to incurred legal costs;

- *State Farm* and *BMW* set as another factor whether "the tortious conduct evinced an indifference to or the reckless disregard of the health and safety of others." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. This case involved an alleged malicious prosecution arising from a business dispute and prior civil action, not a tort implicating health and safety;

- *State Farm* and *BMW* set as another factor whether "the conduct involved repeated actions or was an isolated incident." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. Mitsuhiro presented no evidence of repeated instances of alleged malicious prosecution;

- *State Farm* and *BMW* also set as a factor whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. The "malice" alleged in this action related primarily to the Petitioners' alleged attempt to injure Mitsuhiro's reputation as a pretext to oust him from ownership of the Japanese com-

> panies. Mitsuhiro failed to prove an injury to his reputation, and the Japanese Supreme Court has now ruled that Hirokuni has been the sole and rightful owner all along.

In *State Farm* and *BMW*, the Court declared that "any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of them all renders any award suspect." 123 S. Ct. at 1521. Here, it is questionable whether the evidence satisfied even *one* of the factors set forth in *State Farm* and *BMW*. Under these circumstances, *State Farm* makes it clear that *any* punitive damages award in this action is "suspect"—not to mention an *increased* $15 million award that greatly exceeds compensatory damages awarded, greatly exceeds civil penalties authorized for similar conduct under state law, and greatly exceeds the ratio of punitive to compensatory damage awards in prior similar cases. *Id.*

It bears repeating that Mitsuhiro's principal theory at trial and on appeal was that the alleged malicious prosecution was part of a conspiracy to harm his reputation as a basis upon which to "oust" him from ownership of the Japanese companies in Japan. Mitsuhiro was unable to prove harm to his reputation. More importantly, his alleged "ouster" in Japan—the issue on which the jury and the Appellate Division apparently seized to award record punitive damages—was appropriate as declared by the Japanese Supreme Court.

Thus, it appears that the Appellate Division, like the jury, relied upon Mitsuhiro's purported "ouster" from the Japanese companies as a basis for awarding excessive punitive damages. *State Farm*, however, made it clear that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at

1522. In this case, the "conduct" of terminating Mitsuhiro from the Japanese companies was ruled lawful in Japan. Accordingly, any reliance upon the "conduct" in Japan was improper under *State Farm*.

The Appellate Division's failure to adhere to the principles set forth in *BMW*, *Cooper*, and *State Farm* rendered meaningless the appellate review this Court declared was the talisman for ensuring that punitive damages were consistent with due process. For these separate reasons, certiorari should be granted.

IV. THE APPELLATE COURT IMPROPERLY RELIED UPON PETITIONERS' ALLEGED, BUT UNPROVEN, FINANCIAL CONDITION IN INCREASING PUNITIVE DAMAGES

Rather than apply the "guideposts" mandated in *BMW* and *State Farm*, the Appellate Division increased punitive damages to $15 million on the ground that the trial court "fail[ed] to take into account the millions of dollars expended by defendants herein for legal fees in prosecuting the underlying action and the immense value of the family business." *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29, 30 (1st Dep't 2003). In *State Farm*, however, this Court declared that a defendant's wealth "bear[s] *no relation* to the award's reasonableness or proportionality to the harm," and "cannot justify an otherwise unconstitutional punitive damages award." 123 S. Ct. at 1525 (emphasis added). The Appellate Division's reliance upon wealth—namely, the amounts spent by Petitioners in legal fees and the value of Petitioner Hirokuni Honzawa's business holdings—as the principal basis for *increasing* punitive damages was constitutionally impermissible under *State Farm*. (Pet. App. 6a.)

Perhaps even more troubling is the arbitrary way in which the Appellate Division arrived at its opinion about Petitioners' wealth in increasing punitive damages. The trial court did not consider wealth as a material factor in determining punitive damages because Mitsuhiro *failed* "to submit evidence of defendants' current financial status." (Pet. App. 30a.) Thus, the amount of the Appellate Division's punitive damages award—even if it could properly be founded upon wealth—is sheer speculation. No evidence whatsoever was presented at trial about the real value of the petitioners' real estate holdings, net of the substantial debt that had been incurred.

It was this very "imprecise manner in which punitive damages systems are administered" that led the Court in *BMW*, *Cooper*, and *State Farm* to find that such damages raise concerns of constitutional proportion: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *State Farm*, 123 S. Ct. at 1520, *quoting Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). Here, there was no "presentation" of the Petitioners' "net worth," but the Appellate Division *increased* punitive damages based upon the Petitioners' *presumed* wealth nonetheless. This represented an arbitrary deprivation of property without due process, not only by a jury, but also by an appellate court.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 19, 2004

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

DECISION December 23, 2003
Mo. No. 1300 SSD 50

MITSUHIRO HONZAWA, *et al.*,

Respondents,

—v.—

HIROKUNI HONZAWA, *et al.*,

Appellants.

Appeal, insofar as taken from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, dismissed without costs, by the Court *sua sponte*, upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; appeal otherwise dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December 2003.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1300 SSD 50

MITSUHIRO HONZAWA, *et al.*,

Respondents,

—v.—

HIROKUNI HONZAWA, *et al.*,

Appellants.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as taken from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Clerk

Mazzarelli, J.P., Andrias, Ellerin, Friedman, Gonzalez, JJ.

1923

MITSUHIRO HONZAWA, *et al.*,

Plaintiffs-Respondents-Appellants,

Mark G. Westerfield

—against—

HIROKUNI HONZAWA, *et al.*,

Defendants-Appellants-Respondents,

Kenneth A. Lapatine

YOSHIKO HONZAWA, *et al.*,

Defendants.

1924

MITSUHIRO HONZAWA, *et al.*,

Plaintiffs-Respondents,

Robert O. Johnston

—against—

HIROKUNI HONZAWA, *et al.*,

Defendants-Appellants,

Kenneth A. Lapatine

YOSHIKO HONZAWA, *et al.*,

Defendants.

Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered September 12, 2002, which, to

the extent appealed from as limited by the briefs, dismissed plaintiffs' claim for abuse of process and, after a jury verdict in favor of plaintiffs, set aside the award for emotional distress and loss of consortium, reduced the amount awarded for punitive damages from $50 million to $10 million and awarded plaintiff Mitsuhiro Honzawa the sum of $11,140,430, plus interest, costs and disbursements, unanimously modified, on the law and the facts, to the extent of reinstating the jury's award for emotional distress and loss of consortium and increasing the award for punitive damages to $15 million, and otherwise affirmed, with costs to plaintiffs. Order, same court and Justice, entered May 9, 2003, which denied defendants' motion to vacate the judgment, unanimously affirmed, with costs to plaintiffs.

The absence of proof that defendant Takara International, the plaintiff in the underlying action, had any claim upon the funds that it alleged were converted by plaintiff Mitsuhiro Honzawa, supports the jury's award of damages for malicious prosecution. Testimony by both Mitsuhiro and his brother, defendant Hirokuni Honzawa, concerning the substantial cash deposits they made to Hong Kong bank accounts demonstrates the absence of probable cause to prosecute the action. Having failed to demonstrate that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see also Adam v. Ziriakus*, 92 NY2d 396, 400), defendants' motion to set aside the jury verdict as against the weight of the credible evidence was properly denied.

Plaintiffs established that defendant Hirokuni Honzawa's animosity towards his brother as the motivation for defendants' commencement of a wholly meritless law-

suit and the attachment of plaintiff Mitsuhiro Honzawa's accounts. While the evidence is therefore sufficient to sustain a cause of action for abuse of process (*see Curiano v Suozzi*, 63 NY2d 113, 116), this claim arises out of the same conduct as the malicious prosecution cause of action, and plaintiffs sought identical damages under their respective theories. While the two causes of action can be pleaded in the alternative, only a single recovery is available (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 406).

Reprehensible conduct warrants the award of punitive damages (*BMW of N. Am. v Gore*, 517 US 559, 575; *see also State Farm Mut. Auto. Ins. Co. v Campbell*, __ US __, 123 S Ct 1513, 1519, 1520; *Cooper Indus. v Leatherman Tool Group*, 532 US 424, 434-435). While we regard the jury's award of $50 million to be excessive, the court's reduction fails to take into account the millions of dollars expended by defendants herein for legal fees in prosecuting the underlying action and the immense value of the family businesses. Since "the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others" (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 316), a more substantial penalty than $10 million is appropriate.

The evidence supports the jury's finding for plaintiffs on the causes of action of emotional distress and loss of consortium, and the amounts awarded thereon. That some of the emotional suffering might be attributable to defendants' conduct prior to the commencement of the underlying lawsuit does not preclude an award of damages "when it is manifest that a compensable injury has indeed occurred" (*Spinrad v Gasser*, 235 AD2d 687, 688) and that the harm may result from the aggravation of an existing injury (*see Holley v Transoceanic Cable*

Co., 301 AD2d 417, 420; *Salonia v Samsol Homes*, 119 AD2d 394, 396).

Finally, litigation over the ownership of the family's Japanese business interests is not material to plaintiff's malicious prosecution claim, and Supreme Court properly declined to vacate judgment on the basis of a ruling by a Japanese intermediate appellate court.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

M-4587–*Honzawa, et al. v. Honzawa, et al.*

Motion seeking leave to enlarge record denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 21, 2003

CATHERINE O'HAGAN WOLFE
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 98-602983
Assigned to Justice Ira Gammerman ISA part 27
Filed September 12, 2002

MITSUHIRO HONZAWA, YUKIKO HONZAWA,

Plaintiffs,

—v.—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE, MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN, BETH JACOB, HOWARD PESKOE, LEBEOUF LAMB GREEN & MACRAE, LLP, MENAKER & HERRMANN, L.L.P., RICHARD G. MENAKER,

Defendants.

JUDGMENT

The issues in this action were duly tried before Justice Ira C. Gammerman and a jury at Trial Term, ISA Part 27 of this Court, held at the courthouse at 60 Centre Street beginning on March 11, 2002 and ending on March 21, 2002. Plaintiffs, Mitsuhiro Honzawa and Yukiko Honzawa, were represented by their attorneys, Robert O. Johnston and Mark Westerfield, of the law firm of Johnston & Westerfield, P.C., 3256 Prospect Street, NW, Washington, DC 20007, who were admitted *pro hac vice.* Defendants, both individuals and entities, were represented by their attorneys, Kenneth Lapatine and John Triggs, of the law firm of Greenberg Traurig, LLP, 885 Third Avenue, 21st Floor, New York, NY 10022.

This action, which was filed on June 17, 1998, involved claims of malicious prosecution and abuse of process. At the conclusion of the evidence, the Court dismissed the abuse of process claim as to all defendants (Trial Transcript at 1131-32), and dismissed plaintiffs' claims against Defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa and Frank Ward, submitting to the jury Plaintiffs' malicious prosecution claim.

On March 21, 2002, the jury returned a verdict in favor of Plaintiffs as follows:

American Lawyers' Fees:	$ 1,148,763
Japanese Lawyers' Fees:	691,667
Mitsuhiro Honzawa's emotional distress:	1,131,250
Yukiko Honzawa's loss of consortium:	900,000
Punitive Damages:	50,000,000

Thereafter, Defendants filed motions to set aside and vacate the last four jury verdict amounts, the Japanese lawyers' fees, the emotional distress award, the loss of consortium award and the punitive damage award. Defendants' motion, together with Plaintiffs' opposition and Defendants' reply, were submitted to the Court on May 16, 2002. On August 15, 2002, Justice Gammerman ruled on the motions, granting the motion for judgment notwithstanding the verdict but only to the extent that the award for emotional distress to Plaintiff Mitsuhiro Honzawa, the loss of consortium award to Plaintiff Yukiko Honzawa, and the punitive damages were vacated. Justice Gammerman further ordered a new trial on the issue of punitive damages, unless Plaintiff agreed to an award of $10,000,000. Otherwise, Defendants' motions to set aside the verdict were denied, the Court thus upholding the damage awards for U.S. and Japanese attorneys' fees.

On September 4, 2002, the Court conducted a hearing to determine whether Plaintiff Mitsuhiro Honzawa would agree to the reduction in punitive damages. Counsel for Mitsuhiro Honzawa appeared and submitted a Notice of Plaintiff's Agreement to Award of Punitive Damages, which indicated Plaintiff Mitsuhiro Honzawa would accept the reduction. The Court next entered two credits in favor of defendants, one being the $550,000 already paid as sanctions pursuant to the order resolving the underlying case which provided the basis for the malicious prosecution action, and $150,000 paid by former Defendant Wein & Malkin to resolve claims against that law firm and certain of its attorneys.

Accordingly, the Court ordered the entry of judgment, solely in favor of Plaintiff Mitsuhiro Honzawa, in the amount of $11,140,430, jointly and severally against defendants Hirokuni Honzawa, Takara International,

Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation.

At the September 4, 2002, hearing Plaintiff Mitsuhiro Honzawa sought pre-verdict interest on the attorneys' fee components of the compensatory damages awarded, but the Court denied pre-verdict interest.

Now, on motion of Robert Johnston and Mark Westerfield, Plaintiff's attorneys, it is

ORDERED, ADJUDGED AND DECREED, that Plaintiff Mitsuhiro Honzawa recover against Defendants Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, jointly and severally, the sum of $11,140,430, with interest thereon from March 21, 2002, amounting to $480,718.00, together with costs and disbursements as taxed in the sum of $1095.00, making in all the sum of $11,622,243.00, and that the Plaintiff Mitsuhiro Honzawa have execution therefor.

Judgment signed September 12th, 2002.

[Illegible]
Clerk

Plaintiff's Address:

Mitsuhiro Honzawa
c/o Johnston & Westerfield, P.C.
3256 Prospect Street, NW
Washington, DC 20007

Defendants' Addresses:

Hirokuni Honzawa
c/o Hiro Real Estate Company
650 Madison Avenue
New York, NY 10022

Takara International, Inc.
650 Madison Avenue
New York, NY 10022

Hiro Real Estate Company
650 Madison Avenue
New York, NY 10022

Hiro Enterprise USA, Inc.
650 Madison Avenue
New York, NY 10022

655 Fifth Avenue Manhattan Corporation
650 Madison Avenue
New York, NY 10022

Takara Industry Corporation
650 Madison Avenue
New York, NY 10022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 27

#13880 Index No. 602983/98
Filed September 5, 2002

MITSUHIRO HONZAWA, YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION and TAKARA INDUSTRY CORPORATION,

Defendants.

Before:

HON. IRA GAMMERMAN, Justice.

Appearances:

JOHNSTON & WESTERFIELD, P.C.
Attorneys for Plaintiffs
3256 Prospect Street, N.W.
Washington, DC 200.07
BY: ROBERT O. JOHNSTON, ESQ., and
MARK G. WESTERFIELD, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for Defendants
885 Third Avenue
New York, New York 10022
BY: KENNETH LAPATINE, ESQ., and
JOHN F. TRIGGS, ESQ.

THE COURT: This case is 13880.

There was a trial and a verdict, and then I struck a portion of the award and reduced another portion of the award. And the issue is whether or not the attorneys for the plaintiffs—actually there's only one plaintiff at this point—will, on behalf of their client, consent to the reduction in the punitive damage award. And if they are consenting, I'll direct the entry of an appropriate judgment. If they are not, we'll set a date to try that aspect of the case again.

MR. JOHNSTON: We are accepting, your Honor. We have a notice of acceptance which we would like to present.

THE COURT: Okay. Do we have a caption on this one?

MR. JOHNSTON: Yes.

THE COURT: Who is still in the case?

MR. LAPATINE: The parties that are still in the case are Hirokuni Honzawa and Takara Industry Corporation.

THE COURT: And the cooperation is in, so the judgment should be against the defendants jointly and severally, and they would be in favor of plaintiff Mitsuhiro Honzawa for the—do you have the amounts?

MR. TRIGGS: Your Honor, there's one other procedural issue. If your Honor remembers, there is a previous stipulated amount.

THE COURT: Yes. To reduce. The defendants are entitled to a credit for the previous payment of—

MR. LAPATINE: $550,000. And then they entered into a settlement with another defendant, and they haven't disclosed the amount of the settlement.

THE COURT: Which defendant?

MR. LAPATINE: One of the law firms that has since been dismissed from the case.

THE COURT: How much was that?

MR. JOHNSTON: $150,000.

MR. LAPATINE: So it's a $700,000 credit against whatever—

THE COURT: So why don't you give me the figures. If you can agree on the figures, I'll direct the entry of a judgment in favor of the plaintiff Mitsuhiro Honzawa against the remaining defendants jointly and severally for the amount $1,148,763, plus $691,667, plus $10 million, less $700,000, whatever that figure is.

And get a copy of this transcript, bring it to me, I write "So Ordered" on it, show it to the clerk, and you don't have to get an extract of the minutes. This will be an order directing the clerk to enter that judgment.

MR. JOHNSTON: There's an issue of pre-verdict interest on the attorneys' fees that were paid.

MR. LAPATINE: This was not a contract claim. This was a tort claim.

THE COURT: I think it's a tort claim. And I think Mitsuhiro Honzawa is doing very well, thank you.

Do you have the final number?

MR. WESTERFIELD: Yes. $1,840,430, and minus $700,000 would be $1,140,430.

THE COURT: Plus the award to the Japanese lawyers, and the $10 million; correct?

MR. WESTERFIELD: I added up the two numbers you gave me and got $1,840,430.

THE COURT: You subtracted $700,000 from that?

MR. WESTERFIELD: Yes, and I get $1,140,430.

THE COURT: So it becomes $11 million, I take it: right?

MR. WESTERFIELD: Right, plus the $10 million.

THE COURT: What's that?

MR. WESTERFIELD: That amount plus the $10 million is $11,140,430.

THE COURT: Okay.

(At this time the proceedings were concluded.)

—o0o—

CERTIFICATION:

This is to hereby certify that the foregoing is a true and accurate transcript of the proceedings as reported by me.

WILLIAM L. KUTSCH
William L. Kutsch
Senior Court Reporter

SO ORDERED

ENTER:

IRA GAMMERMAN JSC 9/5/02

IRA GAMMERMAN
9/5/02

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

Index No. 602983/98
P.C. No. 13880

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

Ira Gammerman, J.:

This is a post trial motion in a malicious prosecution action arising out of a family dispute concerning control of a number of corporate entities in Japan and the United States. Plaintiff Mitsuhiro Honzawa ("Mitsuhiro") was originally sued by Takara International, Inc. ("Takara") in New York and in Liechtenstein, for allegedly converting $2,346,841.28 in corporate funds ("the underlying litigation"). In connection with those lawsuits, approximately $2.5 million of Mitsuhiro's funds were

attached. The New York action was transferred to Federal Court, as was the one in Liechtenstein and the attachments were vacated. Mitsuhiro counterclaimed for judgment in his favor and for legal fees. The trial resulted in judgment for Mitsuhiro, both on Takara's claim against him and on his counterclaim. In addition, the court awarded sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure. *See, Honzawa v Honzawa,* 268 AD2d 327 (1st Dept 2000). In June 1998, plaintiffs filed this action for malicious prosecution.

A jury trial was conducted in March 2002. At the close of evidence I directed a verdict dismissing the action as to defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, and Frank Ward. Transcript of Trial ("Tr., at"), at 1131. On March 21, 2002, the jury awarded damages against the remaining defendants, as follows:

American Lawyers' Fees:	$ 1,148,763
Japanese Lawyers' Fees:	691,667
Mitsuhiro Honzawa's emotional distress:	1,131,250
Yukiko Honzawa's loss of consortium:	900,000
Punitive Damages:	50,000,000

Tr., at, at 1289-1291.

Defendants Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation (collectively, the "Hiro Companies") move, pursuant to CPLR 4404 and 5501, for an order entering judgment notwithstanding the verdict in their favor on all claims against them. In addition, defendants Hirokuni Honzawa, Takara International Inc., and the Hiro Companies move for judgment notwith-

standing the verdict on: 1) the emotional distress claim; 2) the loss of consortium claim; 3) the claim for attorneys' fees and costs relating to plaintiffs' Japanese counsel; and 4) the claim for punitive damages. Alternatitely, should the court deny defendants' motion to set aside the verdict on the various claims, defendants ask that the court offer remititur or a new trial concerning each of the elements of damages, as being excessive, and with respective to punitive damages, order a new trial or issue an offer of remititur at an amount less than one times the compensatory damages.

JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE HIRO COMPANIES

Citing *Present v Avon Products, Inc.*, 253 AD2d 183 (1st Dept 1999) and *Du Chateau v Metro-North Commuter Railroad Co.*, 253 AD2d 128 (1st Dept 1999), the Hiro Companies argue that they are entitled to judgment notwithstanding the verdict, because they did not initiate the underlying litigation against Mitsuhiro and no evidence was presented indicating that they played an active or catalytic role in that litigation.

Plaintiffs contend that there was no real distinction between Takara International, Inc. and the Hiro Companies. Plaintiffs rely on the testimony of Hirokuni Honzawa. ("Hirokuni"), as the sole owner of the family businesses, and his son, Yukihiro Honzawa ("Yukihiro"), as an employee and officer of the Hiro Companies, that they did not distinguish between the various companies or the tasks performed on their behalf. Tr., at, at 828, 386. Plaintiffs also contend that the Hiro Companies are liable because of the actions of Yukihiro, Masahiro Honzawa ("Masahiro"), and Frank Ward ("Ward"), which were undertaken in connection with their roles as officers or employees of Hiro Companies. At the close of

testimony, however, I directed a verdict in favor of those defendants. Tr. 1131. I need not reach the question of whether evidence regarding their actions is sufficient to establish liability against the Hiro Companies, or the whether the doctrine of respondeat superior is applicable, however, because of plaintiffs' argument concerning the financing of the underlying litigation.

Plaintiffs argue that, while the Hiro Companies may not have initiated the underlying litigation, they paid for the legal fees for the litigation; and that Takara International did not have sufficient funds to underwrite the litigation (Testimony of Yukihiro Honzawa, Tr. 385-386) and, therefore, had the Hiro Companies not paid the legal fees, the litigation would not have continued.[1]

While the Hiro Companies do not contest that they paid at least some of the legal fees for the underlying litigation, they characterize plaintiffs' evidence concerning the payment of legal fees as "suspicion and speculation." Takara Defendants' Memorandum of Law, at 8. However, during the trial I directed the defendants to provide plaintiffs with a list of who paid for legal fees and how much was paid: Tr. 384-385. Apparently defendants failed to do so; therefore, they cannot now argue that plaintiffs had insufficient evidence of expenditures by the individual Hiro Companies.

The Hiro Companies contend that, even assuming they did pay the legal fees for the litigation, that payment does not constitute the kind of active participation in litigation required for liability for malicious prosecution.

It is clear that liability for malicious prosecution may result from "the initiation or continuation" of the litigation, *Ramos v City of New York,* 285 AD2d 284, 298 (1st Dept 2001). The question of what constitutes initi-

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[1] The parties stipulated that the legal fees for the plaintiff in the underlying litigation totaled $2,531,579. Tr., at 1020.

ation or continuation often arises in the context of a criminal prosecution, where merely reporting an alleged crime or even testifying at trial are not sufficient to trigger liability, *Present v Avon Products, Inc., supra.* Although there do not appear to be any direct holdings on whether payment of legal fees constitutes initiation or continuance, the Appellate Division has indicated that payment of legal fees may be considered by the jury as evidence that the defendant instigated or continued the litigation, *see Macauley v Theodore B. Starr, Inc.*, 194 App Div 643, 655 (1st Dept 1921), *affd* 233 NY 601 (1922):

> "No particular method of proof is necessary to connect the defendant with the prosecution alleged to have been instituted by him. Thus it has been held that to show that the defendant instigated the prosecution, it may be proved that *he employed counsel therefor*, or gave instructions, or *paid expenses*, or procured witnesses. . . (emphasis supplied)"

quoting 18 Ruling Case Law, at 18. The motion of the Hiro Companies for judgment notwithstanding the verdict based on their lack of responsibility for the underlying litigation is, therefore, denied.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO DAMAGES AWARDED FOR EMOTIONAL DISTRESS

The jury awarded Mitsuhiro $1,131,250 for emotional distress. While a plaintiff in a malicious prosecution action may recover damages for whatever are the direct and natural results of the malicious prosecution, *Loeb v Teitelbaum*, 77 AD2d 92 (2d Dept 1980), *order amended*, 80 AD2d 838 (2d Dept 1981), the plaintiff must be able

to establish that the damages flowed from the prosecution, and not from some other cause, *see Miller v. New York*, 90 AD2d 483 (2d Dept 1982). Mitsuhiro testified concerning the emotional distress he experienced in connection with the events of 1995, and his testimony was corroborated by that of his wife. He was not able, however, to distinguish between the impact of the litigation initiated against him, in November 1995, by Takara International and the attachment of his property in connection with that litigation, and the economic impact of being removed from the Honzawa corporations by his brother. According to Mitsuhiro, in June 1995, he was told to take a leave of absence (Tr. 516), and although he was not regularly going to the office, he continued receiving salary through the summer. Tr. 598-599. At some point, however, he no longer received salary. When discussing the impact of the litigation on his family, he discussed the economic impact of no longer bringing home a regular salary. Tr. 534. That, however, was a result of being ousted from the family corporations, and not a direct result of the litigation. When, then, asked to describe the emotional impact of the litigation, he responded regarding the "drastic change in our circumstances. We lived in a tiny home," (Tr. 535) and regarding his distress at not being able to provide for his daughters' marriages. Tr. 536. Those changes in domestic circumstances, however, also resulted from the economic decline that followed his removal from the family corporations. In short, Mitsuhiro was unable to distinguish between the distress he experience from his financial reverses and that suffered as a result of the litigation against him. Tr. 538-539. Similarly, though Mitsuhiro testified about his emotional distress as a result of being called a thief by his mother and the change in his relationship with his mother, according to his testimony, that

occurred in June 1995, months before the litigation began. Tr. 524-526. Therefore, defendants' motion for judgment notwithstanding the verdict with respect to damages for emotional distress is granted, and I need not reach defendants' other arguments regarding the lack of corroborative evidence regarding the severity of plaintiff's injury and the amount of the award.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO DAMAGES AWARDED FOR LOSS OF CONSORTIUM

The jury awarded Yukiko Honzawa ("Yukiko") $900,000 for loss of consortium resulting from the underlying litigation. According to her testimony, prior to the litigation, her husband was much nicer (Tr. 1005) and his "calm, loving face changed." Tr. 1003. Before the litigation she and her husband and their daughters would take long walks, would go to art museums, to the park, and to the zoo. Tr. 991. Her husband would perform "small kindnesses" such as rubbing her back, massaging her shoulders and pouring tea for her, and would assist her with household chores. Tr. 992-993. According to Yukiko, many of those stopped, because he became distracted by the litigation (Tr. 993, 995) and his attitude toward their children changed from being a "kind, gentle father" to one of "extreme irritation." Tr. 994.

In contrast with the testimony of her husband, Yukiko does specifically attribute the changes in their relationship to his distraction resulting from the litigation rather than the economic results of being removed from the family companies. However, a cause of action for loss of consortium is a derivative claim, *see, Spose v Ragu Foods, Inc.*, 124 AD2d 980, 981 (1st Dept 1986) (the wife's right to recover is " 'derived, both in a literal

and legal sense, from the injur(ies) suffered by her spouse'; [*Maidman v Stagg*, 82 AD2d 299, 305 (2d Dept)"]; *Dazzo v. Meyers*, 83-AD2d 14 (2d Dept 1981). It is, therefore, dependent on her husband being able to establish damages of either a physical or emotional nature, *see Garrison v Sun Printing & Publishinq Assn.*, 207 NY 1 (1912); *Pratt v Ocean Medical Care, P.C.*, 236 AD2d 380 (2d Dept 1997). Here, although Yukiko distinguished between the impact on her relationship with her husband caused by the litigation and that caused by the general accusations against her husband by family members and the financial pressures on her husband, he was not able to distinguish between the various causes of his emotional damages. Her testimony is not sufficient to sustain his cause of action for damages. Therefore, her cause of action, which is derivative of his, too, must fail, and I need not reach the question of whether the jury's award of $900,000 for Yukiko's loss of consortium was excessive.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO THE FEES OF THE JAPANESE ATTORNEY

Takashi Maruyama, plaintiff's Japanese attorney in the underlying action, testified that the bill for legal services rendered by him in the underlying action totaled $1,544,714.50, at a rate of $350 per hour. He further testified that he had incurred $66,254.28 in travel expenses and $44,003.85 in hotel expenses. The jury awarded $691,667 in attorneys' fees for the work of plaintiff's Japanese attorney. Defendants challenge that fee award based on the failure of Mr. Maruyama to maintain the documents on which his bill for fees was based. Defendants further argue that, having made an award for less

than the amount of fees allegedly incurred, the jury found that the fees were unreasonable, and that since no documentation was provided to substantiate the fees, the award should be set aside. Defendants argue that under *Matter of Rahmey v Blum*, 95 AD2d 294 (2d Dept 1983) the hours claimed by Mr. Maruyama must be disallowed, because he failed to provide adequate documentation. In *Matter of Rahmey v Blum*, however, the Appellate Division was discussing the method of assessing fees under 42 USC § 1988, not under New York law. Certainly, it is preferable that attorneys seeking fees provide detailed contemporaneous records to substantiate those fees, particularly where the court is awarding attorneys fees pursuant to state or federal statute. Where such documentation is not provided, the court may reduce the award accordingly, *see, Hensley v Eckerhart*, 461 US 424, 433 (1983), or conduct a hearing to determine the reasonableness of the fee claimed, *see, Bankers Trust Co. of California, N.A. v West Shore Apt. Corp.*, 281 AD2d 351, 352 (1st Dept 2001).

Here, however, the award of fees was not made by the court, pursuant to statute, but rather was an element of damages determined by the jury, and as with other jury questions, was based primarily on the jury's determination of credibility. The jury heard the testimony of the Japanese attorney, Mr. Maruyama, who was cross-examined by counsel for defendants. Mr. Maruyama testified concerning the number of hours he devoted to the underlying litigation and his work for other retainer clients. There is no requirement that the jury have any specific documents on which to determine the credibility and weigh the testimony of a witness, and that assessment may lead the jury to reduce the amount of damages requested by the plaintiff.

With respect to defendants' argument regarding spoliation, there was no testimony that Mr. Maruyama purposely destroyed the notes on which his bills were based. Furthermore, this situation is far different from cases cited by defendants in which a party alleges injury by a defective product, such as a stove, and that appliance is discarded or destroyed before it can be examined by the defendants' expert, *see Horace Mann Ins. Co. v E.T. Appliances, Inc.*, 290 AD2d 418 (2d Dept 2002). Here, the notes which were allegedly lost would merely have served to support or undermine Mr. Maruyama's testimony concerning the hours he worked on the underlying litigation. Even without the notes, the jury could, and apparently did, assess the credibility of Mr. Maruyama's testimony, reducing the amount of fees requested by plaintiff. Defendants' motion for judgment notwithstanding the verdict with respect to Mr. Maruyama's fees is, therefore, denied.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO PUNITIVE DAMAGES

Defendants challenge the jury's $50,000,000 punitive damages award as impermissibly excessive. Although there is no bright line establishing just how large a punitive damage award may be without running afoul of the Due Process guarantees of the United State Constitution, the issue has been examined several times in recent years by the United States Supreme Court. In the case of *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 US 424 (2001), citing *BMW of North America, Inc., v Gore*, 517 US 559 (1996), the court listed three criteria that should be considered in determining whether a punitive damages award passes constitutional muster: (1) the degree of reprehensibility of the defendant's mis-

conduct, (2) the relationship between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, or, said another way, the ratio between compensatory damages and punitive damages and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[2] *In Pacific Mutual Life Insurance Company v Haslip.*, 499 US 1 (1991), the court discussed factors to be considered in addition to those indicated above, for purposes of appellate review, i.e., the duration of defendants conduct, the defendant's awareness, any concealment, the existence and frequency of similar past conduct, the profitability to defendant of the wrongful conduct, the financial position of the defendant, and the costs of litigation.

While it is difficult to compare the degree of reprehensibility of particular acts, here, the defendants initiated and/or continued meritless litigation against Mitsuhiro, attaching more than $2 million of his funds. Furthermore, the fact that the litigation was between family members, and not conducted by parties involved in mere business relations, increases the reprehensible nature of the underlying actions. I conclude that such conduct, which caused United States District Court Judge John Sprizzo to rule that the case merited sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, was sufficiently reprehensible to merit punitive damages, though not necessarily in the amount awarded by the jury.

The disparity between the degree of harm suffered by Mitsuhiro and the punitive damages awarded by the jury

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[2] Although the first two criteria appear to contain factors that are to be considered by the trier of fact (and should thus be included in the charge to the jury) the third criteria is apparently to be considered only by the reviewing court.

is somewhat more troublesome. Plaintiff argues that in *TXO Production Corp. v Alliance Resourpes Corp. ("TXO")*, 509 US 443 (1993) the United States Supreme Court upheld a ratio of 526 to 1 punitive damages award. The court expressly noted that, in affirming the award, it was considering not only the harm that *had* occurred, but the harm *that was likely to result* from the defendant's conduct. On that basis, the ratio came closer to 10 to 1, rather than the 526 to 1 asserted by plaintiffs, *id.* at 461-462, *see also, Pacific Mutual Life Ins. Co. v Haslip, supra.*

There is no specific point at which the ratio between punitive and compensatory damages is impermissible. Here, the jury awarded $50,000,000 in punitive damages, and a total of $3,871,680 in compensatory damages, which is a ratio of approximately 12.9 to 1. That ratio is not so far from the ratio upheld in *TXO* as to be totally unreasonable. However, I have found it necessary to grant judgment notwithstanding the verdict with respect to certain aspects of the compensatory award. As a result, the disparity between compensatory and punitive damages has been increased. For example, eliminating the award for emotional distress, because it cannot be sustained by the evidence, and the award for loss of consortium, because it is derivative of the emotional distress claim, reduces the compensatory damages to $1,840,430, shifting the ratio between punitive and compensatory damages to approximately 27 to 1.

With respect to awards in comparable cases, the defendants have submitted a compilation of verdict summaries from malicious prosecution cases gleaned from Westlaw's Jury Verdict Reporter. Those summaries reflect a substantial variation in total awards and in awards for punitive damages, with the largest total award of $16 million, with $1 million in punitive damages, *Komlosi v.*

Fudenberg, 1999 WL 33485321 (SD NY). On the lower end, there are several cases with total awards of approximately $50,000, with punitive damage awards ranging from $25,000 to a low of $10,000, *see, for example Mcarthur v Wal-Mart Stores, Inc.*, 1999 WL 33102770 (Sup Ct, Dutchess County); *Landsman v Moss*, 1992 WL 407665 (Sup Ct, Nassau County). Only rarely, in the cases cited by defendants, did the punitive damage award exceed the award of compensatory damages, *see Abramoski v Goldman*, 2000 WL 33594765 (Sup Ct, Suffolk County) (total award of $155,000, $100,000 of which was for punitive damages).

Contrary to plaintiffs' contention, I may consider these awards despite the fact that they have not been reviewed by appellate courts and arise in different factual settings. I note that many, if not all, of the cases cited by defendants involved allegations that unfounded criminal prosecutions were brought against the plaintiff, a situation which could certainly cause substantial pain and suffering and harm to the reputation of the person prosecuted. However, as the jury instructions indicated, one aspect of punitive damages is setting an amount that would in fact punish the defendants and deter them, as well as others, from acting in a similar way. Plaintiffs did not submit evidence of defendants current financial status; however, there was testimony concerning the substantial assets of defendants in 1995, when the underlying litigation was initiated,[3] and it was stipulated that Takara's legal fee in the underlying litigation was

---

[3] For example, Mitsuhiro Honzawa estimated that in 1995, the assets of the corporations were approximately 340 billion yen, or approximately $3.4 billion. Tr., at 474-476. He further testified that between 1977 and 1995, the companies increased their gross profit from approximately 3.5 billion to 8.5 billion yen, or from $35 million to $85 million. Tr., at 470.

approximately $2.5 million. Therefore, a jury could reasonably conclude that for a punitive damage award to have the intended effect it must be several million dollars.

Considering the factors specified by the United States Supreme Court in *Cooper Industries*, I conclude that the jury's award of punitive damages is " 'grossly disproportional to the gravity of . . . defendant[s'] offense[s].' " *Cooper Industries v Leatherman Tool, supra,* 532 US at 434. Accordingly, defendants' motion for judgment notwithstanding the verdict is granted with respect to the jury's award of punitive damages and the matter is remanded for a new trial unless the plaintiffs agree to accept an award of $10 million for punitive damages.

Accordingly, it is hereby

ORDERED that defendants' motion for judgment notwithstanding the verdict is granted to the extent that the awards for emotional distress, loss of consortium, and punitive damages are vacated; and it is further

ORDERED that a new trial is ordered on the issue of punitive damages unless the plaintiffs agree to an award of $10 million for punitive damages, and defendants' motion is otherwise denied.

Dated: August 15, 2002

ENTER:

IRA GAMMERMAN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

New York County Clerk's
Index No. 602983/98

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

PRE-ARGUMENT STATEMENT

PLEASE TAKE NOTICE THAT Defendants Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, by their attorneys Greenberg Traurig, LLP, hereby submit the following Pre-Argument Statement pursuant to § 600.17 of the Rules of the

Supreme Court, Appellate Division, First Judicial Department.

1. TITLE OF ACTION:

The title of the action is set forth above. The index number of the case in the court below, Supreme Court, County of New York, is 602983/98.

2. FULL NAME OF THE ORIGINAL PARTIES AND ANY CHANGES IN THE PARTIES:

The full names of the original parties are set forth in the caption above; no changes have been made.

3. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR APPELLANTS:

Kenneth A. Lapatine, Esq.
John F. Triggs, Esq.
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(212) 801-2100

4. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR RESPONDENT:

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Robert Johnston, Esq.
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(202) 342-9400

Local Counsel:

Peter Neger, Esq.
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5. COURT AND COUNTY, OR ADMINSTRATIVE BODY FROM WHICH THE APPEAL IS TAKEN:

This is an appeal taken from a Judgment of the Supreme Court of the State of New York, County of New York, entered in the office of the Clerk of New York County on September 12, 2002. Notice of Entry of the Judgment was served by hand upon counsel for Defendants on September 13, 2002, and thus this appeal is timely.

6. NATURE AND OBJECT OF THE CAUSE OF ACTION OR SPECIAL PROCEEDING:

This is an action by Plaintiffs seeking damages for malicious prosecution and abuse of process.

7. RESULT REACHED IN THE COURT OR ADMINISTRATIVE BODY BELOW:

Malicious prosecution and abuse of process claims were tried before Hon. Ira Gammerman, Supreme Court, New York County. The Court dismissed the abuse of process, in its entirety, as to all defendants and dismissed Plaintiffs' malicious prosecution claims against Defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, and Frank Ward.

A jury verdict was returned in Plaintiffs' favor on malicious prosecution as to the remaining Defendants, finding damages as follows:

a. American Lawyers' Fees:	$1,148,763.00
b. Japanese Lawyers' Fees:	$691,667.00
c. Mitsuhiro Honzawa's emotional distress:	$1,131,250.00
d. Yukiko Honzawa's loss of consortium:	$900,000.00
e. Punitive Damages:	$50,000,000.00

The jury verdict was vacated, in part, and remitted, in part. Emotional distress and loss of consortium damages were vacated and the punitive damage award was remitted to $10,000,000.00 and accepted by Plaintiffs. The Court entered two credits in favor of Defendants resulting in the final damage award against Defendants Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Corporation, and Takara Industry Corporation, in the amount of $11,622,243.00.

8. GROUNDS FOR SEEKING REVERSAL, ANNULMENT OR MODIFICATION:

The lower Court ernd: (a) in finding joint and several liability against Defendants, (b) in failing to further reduce the punitive damage award as excessive, (c) in failing to set-aside, in full, the award of Japanese attorneys fees, (d) in failing to dismiss the complaint in its entirety for lack of probable cause, and (e) in failing to dismiss as to Defendants Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, on the grounds that their only participation in the underlying case was through the payment of legal fees, and therefore reversal is warranted on one or more of the above-listed grounds.

9. OTHER MATTERS PENDING:

A dissolution petition is pending before Hon. Paula Omansky, Supreme Court, New York County, Index No. 108032/01. A dispositive motion to dismiss is *sub judice*.

Dated: New York, New York
September 16, 2002

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

New York County Clerk
Index No. 98-602983

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs-Respondents,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants-Appellants.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 500.2

CORPORATE DISCLOSURE

The corporate Appellants in this case, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation ("Takara

Appellants") are privately held entities. The Takara Appellants are not owned in whole or in part by any publicly held entity. The Takara Appellants own varying percentages of the following companies: Hiro Investments, LLC, 655 Property, LLC, 100 Property, SPE LLC, 100 Property Associates, LLC, 100 Property, LLC, Takara Holding, LLC, Takara Associates, Inc., 617 Property, LLC, 39 AF Property, LLC. None of these entities are publicly traded, and none are owned in whole or in part by any other corporate entity other than the Takara Appellants.

(a)1. Title Of Action

The title of the action is as set forth in the caption. The following parties having been dismissed from the case and are no longer in the caption: Wien, Malkin & Bettex, L.P., Robert Buff, Douglas Aronin, Beth Jacob, Howard Peskoe, LeBoeuf Lamb Greene & MacRae, L.L.P., Menaker & Herman LLP, and Richard G. Menaker.

2. Source Of Appeal

This appeal is taken from the First Department Appellate Division. The order appealed from and notice of its entry was served by hand by the Respondents on the Appellants on October 21, 2003. The Decision and Order modified in part and affirmed in part the Decision and Order of the trial court entered after a jury verdict. There are no longer any claims pending in this case.

3. The Notice Of Appeal

Notice of Appeal to this Court was served on counsel for Appellants on October 24, 2003 by U.S. Mail and facsimile and filed on October 24, 2003 in the New York County Clerk's Office.

4. Order Appeared From And Notice Of Entry

The Decision and Order of Appellate Division First Department was entered on October 21, 2003 and served by hand the same day.

5. Attorneys For Respondents

The names and addresses for the attorneys for Respondents is Johnston & Westerfield, 3256 Prospect Street, N.W., Washington, D.C. 20007-3214, and Bingham McCutcheon, LLP, 399 Park Avenue, 24th Floor, New York, New York 10022.

(b) COPIES OF NOTICES OF APPEALS AND ORDERS

Attached hereto as:

(1) Exhibit "A" is a copy of the Notice of Appeal with proof of service from the decision and order of the Appellate Division First Department;

(2) Exhibit "B" is copy of the October 21, 2003 decision and order of the First Department;

(3) A copy of the decision and order of the State Supreme Court entered September 12, 2002;

(4) See Exhibit B;

(5) See Exhibit C;

(6) Not applicable.

(c) JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction to hear this appeal pursuant to CPLR 5601(b)(1) because the $15,000,000.00 punitive damages award raises due process questions under both Article I Section 6 of the New

York State Constitution and the Fourteenth Amendment to the United States Constitution.

The specific issues to be raised in this appeal are as follows:

I The jury awarded the Respondents $50,000,000.00 in damages which the trial court reduced to $10,000,000.00. The Appellate Division's increased award of $15,000,000.00 in punitive damages was grossly excessive and violated Article 1 Section 6 of the New York Constitution and the Fourteenth Amendment of the U.S. Constitution in that:

1. The Court failed to consider a comparison of the amount of the punitive damages award and the amount of the civil penalties authorized or imposed for comparable misconduct;

2. The Court failed to consider a comparison of the amount of punitive damages to the actual harm inflicted on the Respondents as a result of the institution of the underlying action;

3. The Court failed to consider the degree of reprehensibility of Appellants' conduct in light of the absence of aggravating factors, in that:

the injury claimed by plaintiff as a result of the institution of the underlying action was purely economic;

defendants' alleged tortious conduct did not evince an indifference to, or a reckless disregard of, the health or safety of others;

defendants were not shown to be recidivists;

4. In connection with conduct outside New York, the Court impermissibly considered conduct outside of its jurisdiction which preceded the institution of the underlying action and in particular:

> the court relied on out of state conduct that could not form the factual basis for compensatory damages to justify the award of punitive damages;
>
> punished defendants for out of state conduct which has been established to be lawful where it occurred;
>
> refused to enlarge the record to include a final decision holding that defendants' out of state conduct was lawful where it occurred.

5. The Court impermissibly awarded punitive damages to punish and deter conduct that bore no relation to the harm for which Respondents received compensatory damages;

6. The Court impermissibly calculated its award of punitive damages on a ratio approaching 5 times the compensatory damages in the award as modified (and eight times the compensatory damages in the original judgment), notwithstanding that compensatory damages were substantial, and that an element of the compensatory damages was duplicated in the punitive damages;

7. The Court impermissibly justified the award of punitive damages on incompetent evidence concerning the alleged wealth of Appellants;

8. The charge to the jury was improper because it did not incorporate any of the guidelines enunciated by the United States Supreme Court in *State Farm Mutual Automobile Insurance Co., v. Campbell*, 123 S.Ct. 1513 (2003);

9. The punitive damage award is so excessive as to be inconsistent with the common law of the State of New York.

II The trial court should have set aside the verdict because a judgment entered by the Japanese Supreme Court proves that Respondents' core testimony and crucial theories advanced at trial were false.

III The trial court was required to instruct the jury that probable cause was presumed and to overcome that presumption the Respondents were required to establish fraud or perjury because the courts in the underlying action issued preliminary and interlocutory orders by which those courts acknowledged the merits of the underlying action.

IV The Appellate Division should have enlarged the record to include the decision of the Japanese Supreme Court which conclusively demonstrated that the Respondents' proof of the malice element in a malicious prosecution claim was false.

IV The evidence at trial was not sufficient to establish a lack of probable cause to have commenced the underlying action upon which this malicious prosecution action is based.

V The damages for costs and fees incurred by Mitsuhiro's Japanese attorney should have been rejected because of the spoliation of the crucial evidence upon which such damages were based.

VI The corporate defendants should not have been held jointly and severally liable for malicious prosecution.

VII The Appellate Division should not have reinstated the jury's verdict for loss of consortium which had been set aside by the trial judge.

VIII The Appellate Division should not have reinstated the jury's verdict for emotional distress which had been set aside by the trial judge.

(d) Not Applicable

Dated: New York, New York
October 31, 2003

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs
Attorneys for the Defendants-Appellants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation

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Attorneys for Respondents

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Clerk
Index No. 98-602983

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE That the above named defendants pursuant to CPLR 5601(b)(1) appeal to the Court of Appeals from an order of the Appellate Division First Department entered in the office of the Clerk of the Appellate Division on October 21, 2003, a true copy of which is attached hereto, and which order finally determines this action in which there is directly involved a

construction of provisions of Article 1 Section 6 of the Constitution of the State of New York and of the Fourteenth Amendment of United States Constitution.

PLEASE TAKE FURTHER NOTICE That the defendants' appeal from each and every part of that order of the Appellate Division as well as from the whole order.

Dated: New York, New York
October 24, 2003

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs
Attorneys for the Defendants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 602983/98
(Gammerman, J.)

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that Defendants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, hereby appeal to the Appellate Division, First Department, of the Supreme Court of the

State of New York from the Judgment entered in the Office of the Clerk of the Supreme Court of the County of New York on September 12, 2002, and from each and every part thereof.

Dated: New York, New York
September 16, 2002

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

Index Number 602983/98
March 12, 2002

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES, U.S.A., 655 5TH AVE. MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN, MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN BETH JACOB, HOWARD PESKOE, LEBOEUF, LAMB, GREENE & MACRAE, LLP, RICHARD G. MENAKER,

Defendants.

BEFORE:

HONORABLE IRA GAMMERMAN, Justice.
and a Jury

APPEARANCES:

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Attorneys for the Plaintiffs
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BY: ROBERT O. JOHNSTON, ESQ.
MARK WESTERFIELD, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for the Defendants
885 Third Avenue
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BY: JOHN E. TRIGGS, ESQ.
KENNETH LAPATINE, ESQ.

---

happened to those records in the absence of the jury and decide at that point.

MR. LAPATINE: I would like to make a point.

THE COURT: Make it then. Why don't we move on.

MR. LAPATINE: The last goes to an injury relating to emotional distress and loss of reputation—

THE COURT: Didn't I leave that in?

MR. LAPATINE: On three occasions you told them that they would have to have corroborative evidence with respect to these damages issues.

Now, they do not have, with respect to emotional distress—

THE COURT: Loss of reputation I said, with respect to loss of reputation, it seems to me they have to produce

someone who is going to testify that his view of the defendants' reputation was damaged as an result of this lawsuit.

And that is what I said.

And I wasn't going to let the defendant himself testify that his reputation was damaged.

MR. LAPATINE: You also ruled they would have to bring any such witness to the United States within two weeks of the trial.

THE COURT: Absolutely.

MR. LAPATINE: They don't have that witness.

THE COURT: Then that claim is going to be eliminated.

MR. WESTERFIELD: Are we dealing with reputation or emotional distress?

THE COURT: Reputation.

MR. WESTERFIELD: Reputation issue. I don't know where the line is—

THE COURT: Counsel, I made myself very clear.

MR. WESTERFIELD: Can I explain the situation? We have a witness here—

THE COURT: Unless there is someone prepared to testify that his view of the defendant, the individual defendant's reputation was lowered as a result of this litigation, that claim will not be submitted to the jury.

MR. WESTERFIELD: Can I explain certain scenarios?

THE COURT: Yes, of course.

MR. WESTERFIELD: For example, we have a list of 50 people our client dealt with on a regular basis over the

course of 30 years. He will testify that after this word got out as to what he did, those people never contacted him again.

THE COURT: No, I made myself absolutely clear, no. That is it. That is not going to the jury.

What else?

MR. LAPATINE: Emotional damage. They need medical testimony to corroborate medical—

THE COURT: Yes.

MR. LAPATINE: They have none. No expert report.

MR. WESTERFIELD: There is no case that supports that situation. However, malicious prosecution.

THE COURT: I don't know, did I ask, did I discuss this previously?

MR. LAPATINE: No.

THE COURT: I think we will let that go to the jury.

Anything else?

MR. LAPATINE: Your Honor, we cited in our brief three or four cases that, in which the Appellate Division specifically said in order to support an emotional injury you need objective proof and that objective proof must be medical testimony.

MR. WESTERFIELD: Those are cases having to do with ovum being implanted in some other woman. That is the case they cited for this principle. There are negligence cases having to do—

THE COURT: I assume there are negligent cases involving infliction of emotional distress in which the jury has been permitted to determine damages without a

physician testifying. I mean it certainly goes to the weight of the claim and certainly within my opinion would affect the measure of damages.

I would tell you right now without medical testimony, I would, in my view, even limit the damages that any jury awards in this regard.

Counselor, I have ruled.

Anything else we have to talk about now?

MR. WESTERFIELD: Can I refer you to Hickey, which is a Court of Appeals case which specifically applies in this case, and does not require medical testimony.

THE COURT: Counselor, if there is no medical testimony, I will certainly limit the damages that the jury can award, I will tell you that right now, so I don't know what we are trying this case for except to make lawyers rich.

I will see you all tomorrow at 9:30. (Trial adjourned to March 12, 2002, at 9:30 a.m.).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

Index Number 602983/98
March 12, 2002

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES, U.S.A., 655 5TH AVE. MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN, MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN BETH JACOB, HOWARD PESKOE, LEBOEUF, LAMB, GREENE & MACRAE, LLP, RICHARD G. MENAKER,

Defendants.

BEFORE:

HONORABLE IRA GAMMERMAN, Justice.
and a Jury

APPEARANCES:

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no bank accounts with Takara International on it in Hong Kong. Takara International would have been required to file taxes in the U.S. on that income received in Hong Kong had they ever declared income. It had shops in Hong Kong, but never declared those shops as an asset, never declared income from the shops as income. It had never taken any depreciation on the shops as income in Hong Kong.

There was no connection whatsoever between the Takara International and the money that Mitsuhiro transferred, and there was no effort on their part to find out if there was any connection before they sued, in part because they would have been prudent for themselves or for their lawyers. This wasn't good faith, a good faith basis for the lawsuit.

We are going to go through with Yukihiro, he will be here, he's talking about the affidavit, the lawyers—actually somee of them left. We'll talk to you about their affidavits and what they did. And they've already testified in deposition that they believed when they filed the affidavit that the basis for it was Yukihiro's affidavit, and that was explained, and that was valid, and they should rely on what the client told them. And you will hear that testimony earlier or later this morning.

Moving slowly. Why would they do this? We have explained the role of the sons, the sons became of age. This was an effort to transfer management control to the sons. And I told you I'm not going to go into any detail, there will be testimony, but the sons admittedly, they discussed replacing Mitsuhiro, in their own plans for replacing him before Mitsuhiro ever came to New York.

As a direct result of the allegations of theft, and Mitsuhiro will describe to you the fact that has in Japan, Japanese society, which is hard to say what it would be like here, but you can tell what it's like there, which is if you are stealing from corporate funds, it's about the worst thing you can do, because they—

MR. LAPATINE: Objection, your Honor.

THE COURT: Yes, we are not going to deal with that, counselor, I already ruled. Let's proceed. So he is not going to testify on the effect it had in Japan, I'll tell you that right now. Let's proceed.

MR. WESTERFIELD: He will describe to you the effect that this has had on him and his family.

THE COURT: He can describe that.

MR. WESTERFIELD: Pardon?

THE COURT: He can testify about that.

MR. WESTERFIELD: He's going to describe to you that —the basis—as a result of the false allegations, he was fired as the director and an officer.

He will describe to you the relationship he had with his other family members, including his mother. His mother is in her 80s. And it's part of their society, he would go to visit her once a week, he brought flowers, he had a very traditional visitation or custom they followed. He would go to her quite often.

Since these allegations were made, not only was he dismissed as director, but the mother has completely turned against him. She's accepted these allegations as being true, although Hirokuni has admitted he has not explained to her the result of the trial of the Takara International, and she's completely turned against him. She was one of the directors of the Japanese corporations, so that led to his being fired or terminated in Japan.

I haven't described—I'm going to just touch on it very briefly. In addition to suing him in the U.S., and getting attachments in the U.S., they concurrently sued him, the same exact allegation and same affidavit signed by the nephew of Mitsuhiro in Liechentenstein to attach the money, they also sued him for that in Hong Kong to make the same allegations there, and also sued him in Japan, all going at the same time. So ultimately he had the same litigation pending on four continents.

The intention of this case was to cut Mitsuhiro off from his funds, to make him spend the money that he had available to him. He will describe to you—this is common in Japan, very unusual in our society, a corporate executive essentially leaves all of his assets, and

this is what he and his brother had done, all—all of their assets were in the company.

So we would assume under U.S. normal procedures that the money was held by the executives, but in this case, virtually all of his money was held by the company. So when he was cut off from salary and other income, he was left almost nothing.

MR. LAPATINE: Objection, your Honor. I'm not sure what this is relevant to.

THE COURT: Let's find out. Members of the jury, there are very clear circumscribed claims that are going to be submitted to you. I suspect this is not one of them.

Let's proceed.

MR. WESTERFIELD: The reason that the claim, this explains the malice, the malice and improper purpose, this is why the lawsuit was filed, in order to justify firing Mitsuhiro to the bankers, to the family members, and to turn the family members against Mitsuhiro.

They had to do something other than simply say, okay, we want to push you out. And the allegations of theft were made in this case, those were the basis for terminating his employment. Hirokuni admits to that. Yukihiro admits to that. Masahiro admits to that. That part of it is not in dispute.

The reason Mitsuhiro is suing is a couple of things. One, being compensated for what he spent in defending the initial trial, the Takara International trial. So one of the clams he will make is going to be for reimbursement of his legal fees. But in many ways that's a small part of what he is seeking.

He is also entitled to damages, money damages for payment to compensate for emotional injury he suffered

from being called a thief, from the change of his relationship with his family. All the money, financial aspects that would flow directly from someone saying you are a thief and being kicked out of your own business, he's entitled to compensation for that. And under our system, that's ends up equated in some way with dollars for that emotional loss, and that's what we are asking for.

Mitsuhiro is suing, you heard of malicious prosecution, there is a separate cause of action which is for abuse of process that relates to the money that had initially been attached in the Liechentenstein matter. We will describe to you, it came back to the U.S. still under a court order, so even in the time period when the second law firm had said they could not win the case, they still refused to give that money back to Mitsuhiro.

There were a few different times where demands were made, saying look, you admit you can't win, give him the money back that's been attached, and both times they said no. And they held it, even admitted that they couldn't win, they held the money for another nine months or so. And in part to continue the implication that they were justified in doing so. In part to show that he was a thief.

We're also going to ask you for punitive damages. When this is done, this is a case that shouldn't have been filed, it was done maliciously, it was done without evidence. It was done on the part of Hirokuni and his family, knowing that the allegations were false, they did it in a way to try and seize control of the family business by using this case and allegations in this case. And as a result we are going to ask you to impose punitive damages.

I've a few additional points I would like to make regarding things that I think you will hear as part of the defense of the case.

First of all, under this procedure in this case, they are going to be able to explain the financial record or apparently will be able to do so. But you need to ask yourself as you hear the testimony, ask whether it was available to them during the Takara International trial, when they presented it in that trial or whether this is just a new spin on exactly the same old information.

They're going to present testimony from a friendly accounting expert, assuming he's allowed to testify—I expect I'm going to use his information to show that there was more than enough money, personal money in the account in Hong Kong to have allowed Mitsuhiro to transfer his own personal money to another bank. So instead of showing this was Takara International money, it will actually show it was Mitsuhiro's personal money.

One thing that has been done in the past, I don't know whether it will happen in this case, is at some point they're referring to Takara International money, which is what they say was stolen, and other times they talk about corporate money. Now, the implication

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Supreme Court, U.S.
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No. 03-1365

IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

v.

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Jurisdiction on a Petition for Writ of Certiorari from a state court is controlled by 28 U.S.C. § 1257(a).[1]

INTRODUCTION

This appeal challenges the punitive damages component of a judgment rendered against Petitioners in a malicious prosecution case, predicated on a civil action, which the trial judge described as one of the worst cases of malicious litigation he had ever seen. The ratio of punitive to compensatory damages is less than 4:1.

None of the Rule 10 considerations governing review of certiorari petitions apply in this case. The New York appellate courts did not decide a federal question. Rather this case touches upon constitutional issues *only to the extent that* precedent from the Supreme Court was incorporated into the jury instruction and was then considered by the trial court and the Appellate Division, both of which applied the U.S. Supreme Court precedent to the facts of this case in reviewing the jury verdict. There was never a dispute regarding the construction, or the interpretation, of the due process clause or of any U.S. Supreme Court precedent.

This petition for certiorari should be denied because: the order from which petitioners appeal is not final; petitioners failed to preserve the points for appeal; and, despite Petitioners' claim that the New York Appellate Division "failed to consider" their arguments, in fact, all the issues were fully aired before that court. The punitive damages awarded in this case were reviewed on multiple occasions and determined to be in accord with the holdings in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

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1. Petitioners incorrectly assert jurisdiction based on 28 U.S.C. § 1254. That section refers to appeals from the U.S. Courts of Appeal.

COUNTER-STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, in the name of Takara International, Inc., ("Takara International"), maliciously initiated a lawsuit in New York, (the "underlying case" or "Takara International case") against Mitsuhiro Honzawa, ("Mitsuhiro"), falsely alleging that he had "embezzled" from the family businesses, as a pretext by which Petitioners could convince other family members and business and banking associates in Japan and New York that Mitsuhiro should be ousted from the family businesses.

To explain the malice behind Petitioners' decision to file the underlying case requires a digression to describe the Honzawa family businesses and the history of the funds that Mitsuhiro was accused of stealing.[2]

A. The Honzawa Family Businesses

For more than 30 years, Mitsuhiro and his brother, Hirokuni Honzawa ("Hirokuni"), operated the family businesses as partners, with side-by-side desks in a single office in Tokyo, Japan. RA1319-25.[3] Their father had established the business, and Hirokuni and Mitsuhiro expanded the real estate holdings to include various warehouses in Japan and numerous properties in the United States. By 1995, the business had a net worth of $3.5 billion. RA1325-27.

In 1995, Hirokuni's two sons, Masahiro and Yukihiro, were in their mid-twenties, and it was agreed to put them into the family business as "trainees," much the same as Mitsuhiro and

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2. For purposes of responding to the Petition, details concerning the disputed funds are, largely, irrelevant. Because, however, Petitioners have continued to misrepresent the facts and because the history of the funds shows the utter lack of probable cause in the underlying litigation, and hence the level of malice and reprehensibility of Petitioners' actions, a rendition of these facts is necessary. A detailed summary of the evidence presented at the malicious prosecution trial was attached to Respondents' Opposition to the Petitioners' Motion for Leave to Appeal submitted to the New York Court of Appeals and is reproduced in the Appendix at 8A-16A.

3. References to the Record on Appeal as filed with the New York Appellate Division are designated by "RA."

Hirokuni had been trainees together under their father. RA1095. Unbeknownst to Mitsuhiro, however, Hirokuni and his sons had previously discussed removing Mitsuhiro and replacing him with the nephews. RA1196-99. In April 1995, Yukihiro came to the U.S. to begin training under Mitsuhiro, but in an introductory dinner meeting with important Japanese bankers, Yukihiro was extremely disrespectful toward Mitsuhiro, which incensed Mitsuhiro. RA1393-94. In June 1995, Mitsuhiro and Hirokuni discussed the incident. Their mother had suggested that Mitsuhiro take a leave of absence and Mitsuhiro agreed to take some time to "cool off." RA1367, 1705-1707.

B. The Hong Kong Accounts

Mitsuhiro and Hirokuni maintained personal funds in bank accounts and other investments in Hong Kong. RA1305-07, 1343-45. The genesis of the Hong Kong money was approximately $2 million in cash that the brothers had taken from Tokyo to Hong Kong, in the late 1970s and early 1980s, and deposited to interest bearing accounts. RA1305-07. By August 1995, the cash, plus accrued interest, totaled nearly $5.5 million. RA1959-60. All of this money was held in accounts in the name of a family friend, who was a Hong Kong resident, although the money actually belonged to Hirokuni and Mitsuhiro. RA1306. Significantly, the Hong Kong money was never in an account in the name of Takara International (RA1305) and money in the accounts did not have, and had never had, a connection to Takara International. RA1305.

Because of the disagreement he had had with his brother and his nephews, in August 1995, Mitsuhiro traveled to Hong Kong and withdrew his half of the money (approximately $2.2 million) and deposited this money to an account in his own name at the Hong Kong office of a Liechtenstein bank. RA1365-66. Petitioners' claim that Mitsuhiro took this action "secretly" and that Hirokuni was hospitalized at the time, but there is no citation to any evidence to support these claims, and Mitsuhiro testified that he was unaware of Hirokuni's hospitalization, if it occurred. RA1367.

The underlying Takara International case conclusively determined that the funds transferred by Mitsuhiro were his personal funds and had no connection with Takara International. Nonetheless, Petitioners continue to refer to the Hong Kong money transferred by Mitsuhiro as "corporate funds" (Petition at 3) without citation in the record and despite a complete absence of any evidence to support their claim.

C. Facts Leading To Filing Of The Underlying Case

In September 1995, after the "cooling off" period, Mitsuhiro returned to work on a regular basis at the offices of the family business. RA1361. As a result of Mitsuhiro's return, Hirokuni and his sons needed to concoct another plan by which Mitsuhiro would be forced out of the family businesses. They implemented a plan to fabricate a claim that, by transferring his funds from the Hong Kong accounts, Mitsuhiro had embezzled company funds and, on that basis, they would convince other family members, long-term company employees, bankers and other business associates that Mitsuhiro should be terminated from his positions with the family businesses.

In October 1995, before the underlying case was filed, Hirokuni, with his wife and son, met with the family friend in Hong Kong for several days and they discussed the Hong Kong accounts and the money Mitsuhiro had transferred. RA1217-18, 1694-95. From these meetings, Hirokuni necessarily knew that Takara International had no accounts in Hong Kong and that the origin of the Hong Kong funds could be traced to the cash transfers in which Hirokuni had participated. RA1184-85, 1695.

In early November 1995, Mitsuhiro told his brother that he was no longer willing to allow the nephews to be trainees. In addition, an attorney representing Mitsuhiro, called upon Hirokuni to discuss arrangements for dividing the family businesses into two parts. RA1477.

In response, Hirokuni and his family began to claim that Mitsuhiro had stolen the Hong Kong money from Takara International. RA1224, 1709-11. On November 14, 1995, without notifying Mitsuhiro, Hirokuni convened and presided

over a directors' meeting of the Japanese family businesses at which their mother made a motion for Mitsuhiro's removal because of the "theft" and authorized the Takara International lawsuit to be filed to recover the "stolen" funds. RA1708-09, 1711, 1182.

D. The Takara International Litigation

Immediately thereafter, in the name of Takara International, the underlying case was filed in New York, by which the Petitioners formally called Mitsuhiro a thief and claimed that he had stolen money from Takara International. RA965, 2155. (Petitioners incorrectly state that this was a "replevin" action. In fact, the suit was a tort action alleging three causes of action – conversion, breach of fiduciary duty and fraud. RA2155-58.) Soon thereafter, nearly identical suits were filed in Liechtenstein and Hong Kong.

In New York, Petitioners attached approximately $250,000 in Mitsuhiro's personal bank account, despite their knowledge that the account had no connection to the Hong Kong funds transferred by Mitsuhiro. In Liechtenstein, Petitioners attached Mitsuhiro's $2.2 million in the Liechtenstein bank. The case was removed to the U.S. District Court for the Southern District of New York, where, over the course of a year, Petitioners were given repeated opportunities to demonstrate the merits of the case. In December 1996, the New York attachment was dismissed because Petitioners could not substantiate their claims or show a likelihood of success on the merits. RA1011.

In the spring of 1997, after a trial date was scheduled in the New York case, Petitioners agreed to dismiss the Liechtenstein case and to move the attached funds ($2.2 million) to the U.S. pending further order of the U.S. court. RA1030. Despite repeated demands and a complete absence of evidence to support their claims, the Petitioners continued to refuse to release the attached funds. RA1030-32, 2280, 2286.

The case went to trial in September 1997. In opening statement, counsel for Takara International admitted that, despite the allegations in the complaint and the accompanying

affidavits, he could not connect Takara International to the funds in Hong Kong. RA1602-03. Petitioners presented no evidence in support of their allegations. At the conclusion of the evidentiary phase of the trial, the trial judge, Hon. John Sprizzo, released the $2.2 million that had been held. RA1039. After final argument, Judge Sprizzo

> ruled that the case was appropriate not only for Rule 11 sanctions but a sizable award of damages resulting from the improvident seeking of injunctive relief and the continuation of this application long after it had been reasonably clear to a lawyer of ordinary intelligence and ability that the case should have been dropped much sooner.

Honzawa v. Honzawa, 268 A.D.2d 327, 701 N.Y.S.2d 411, 413 (1st Dept. 2000) ("*Honzawa I*"). Sanctions of $550,000 in legal fees were paid, with a specific agreement to allow a malicious prosecution case to proceed. (Petitioners' claim at page four that the parties "negotiated damages" for "wrongful attachment" is not an accurate description of what transpired and is not supported by the record.)

E. The Malicious Prosecution Case

In June 1998, Mitsuhiro and his wife filed the malicious prosecution action in New York state court against Hirokuni, Hirokuni's family members, the Honzawa family New York corporations, which had paid for the underlying litigation, and the three law firms that had represented Takara International.

The state court judge, Justice Ira Gammerman, initially dismissed the case, but that decision was reversed on appeal. *Honzawa I, supra.*

The malicious prosecution case ensued and went to trial in March 2002.[4] Even on the eve of trial, Justice Gammerman

4. Petitioners' references to a claim for "reputational harm" (e.g., Pet. at 4, 5, 8) are both nonsensical and not supported by the record. Having asserted a tort claim, Respondents sought the usual tort damages: emotional distress, damage to reputation and economic loss. The citation provided by Petitioners (Pet. Appx. 51a-53a) is the passage where the trial court ruled that evidence of harm to Mitsuhiro's reputation could only be presented by testimony from witnesses, and not from Mitsuhiro or his wife, but the (Cont'd)

expressed skepticism about the merits of the case. RA55. After he had heard all of the evidence, however, Justice Gammerman made a 180-degree turn and concurred with the opinion of Judge Sprizzo. Pet. Appx. at 8a.

This Court's precedent was first raised in this case by Justice Gammerman, on his own initiative, as he was preparing the jury charge at the conclusion of the evidentiary phase of the trial. RA1990. At that time, Justice Gammerman expressly stated his intention to modify the standard jury instruction on punitive damages to reflect the U.S. Supreme Court precedent. RA1997-98. Petitioners' *never* objected to the proposed instruction or to the instruction as given and *never* requested an alternative instruction or a modification of the proposed instruction. RA2119-21. (The punitive damages instruction is at RA2114-16, reproduced in Respondents' Appendix at 3A-6A.)

On March 21, 2002, the jury rendered a unanimous verdict in favor of plaintiffs and assessed the following amounts as damages:

American lawyers' fees	$1,148,763.
Japanese lawyer's fees	$691,667.
Mitsuhiro's emotional distress	$1,131,250.
Mrs. Honzawa's loss of consortium	$900.000.
Punitive damages	$50,000,000.

On a post-trial motion to set aside the verdict, the trial court upheld the finding of liability, upheld the award of legal fees, set aside the emotional distress damages and the

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trial court expressly allowed proof of emotional distress. As a result of the ruling, Mitsuhiro could not prove "harm to reputation" because he could not bring to New York for the trial a succession of witnesses from Tokyo. While Mitsuhiro did not agree with the ruling, given the damages awarded by the jury for emotional distress, he did not challenge that ruling on appeal. The other citation provided by Petitioners (Pet. Appx. 23a) is the passage from the post-trial order denying damages for emotional distress. This decision was reversed by the Appellate Division. These rulings concerning damage to Mitsuhiro's reputation do not, in any manner, impact, and are wholly irrelevant to, the review of the punitive damage portion of the judgment.

consortium damages, and remitted the punitive damages to $10,000,000. Mitsuhiro accepted the remittitur and judgment was entered September 12, 2002, in the amount of $11,622,243.

The post-trial motions (RA2496, RA2710, and RA2577) cited and relied upon the decisions of this Court. The order deciding the post-trial motions discussed the ratio of compensatory damages to punitive damages and stated that the amount of punitive damages was reduced, primarily, because of the reductions (later reversed by the Appellate Division) that had been made in the post-trial ruling. Justice Gammerman expressly relied upon, and cited to, this Court's precedent. Pet. Appx. at 27a-29a.

F. The Appeal to Appellate Division

Petitioners appealed the judgment to the Appellate Division. Because Petitioners appealed after the remittitur had been accepted, Respondents were entitled to cross-appeal. N.Y. Civil Practice Law and Rules ("CPLR") § 5501(a)(5). So, Respondents appealed the trial court's remittitur order and the vacature of damages for emotional distress and loss of consortium. Shortly before Respondents filed their brief, this Court rendered its decision in *State Farm*. As a result, both sides fully briefed the holding of *State Farm* to the Appellate Division. *See* Respondents' Brief, Petitioners' reply brief, and Respondents' reply brief.[5]

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5. Petitioners made two appeals to the Appellate Division after the trial. The first occurred after entry of the judgment in September 2002. The second came in May 2003, more than a year after the malicious prosecution trial had concluded. The second appeal arose from Petitioners' motion to set aside the verdict based on the outcome of a Japanese appellate court decision. (*See* discussion at p. 10 *infra*.) In opposing the motion, Mitsuhiro argued that the Japanese decision directly contradicted an earlier decision involving a family partnership, named Keigyosha, which is owned equally by Mitsuhiro and Hirokuni and which owns part of all the Honzawa family corporations. Justice Gammerman ruled that the outcome of the Japanese appeal was not relevant to the case, and that Petitioners could have submitted any such evidence at trial but chose not to do so. He also stated that the Japanese ruling may have signified only that Petitioners had finally accomplished, through legal means, what they had been trying to accomplish "extra legally." Record from Appeal to Appellate Division based on denial of Motion To Vacate, RA15. The motion was denied and

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The five-judge Appellate Division panel rendered a unanimous decision that increased the punitive damages to $15 million and reinstated damages for emotional distress and loss of consortium. *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29 (1st Dept. 2003), *appeal dismissed*, 1 N.Y.3d 546, __ N.E.2d __ (2003), *leave denied*, __ N.Y.3d __, __ N.E.2d __ (2004). Pet. Appx. at 4a-7a. In reviewing the punitive damage portion of the judgment, the Appellate Division expressly relied on this Court's holdings in *State Farm*, *BMW*, and *Cooper Industries*. The Appellate Division found that: "[Respondents] established that Petitioner Hirokuni Honzawa's animosity towards his brother was the motivation for [Petitioners'] commencement of a wholly meritless lawsuit and the attachment of Mitsuhiro Honzawa's accounts" and that such "[r]eprehensible conduct warrants the award of punitive damages." Noting that the purpose of punitive damages is to punish the offender and deter similar conduct on the part of others, the Appellate Division increased the punitive damage award to an amount it deemed appropriate in light of the millions of dollars Petitioners spent on legal fees, which had had no deterrent affect, and the enormous wealth of the Petitioners, which had allowed the Petitioners to act so reprehensibly and without any financial constraints.

G. The Appeal Of Right Was Dismissed

After the Appellate Division decision, Petitioners had two further appellate options: (1) an "appeal of right" pursuant to CPLR § 5601 or (2) an "appeal by permission" pursuant to CPLR § 5602. Petitioners chose to seek only an "appeal of right" to the New York Court of Appeals, pursuant to CPLR § 5601(b)(1), claiming this case directly involved the

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(Cont'd)

Petitioners appealed. The second appeal was joined with the main malicious prosecution appeal and the Appellate Division affirmed Justice Gammerman's decision in the same order from which the Petitioners now appeal. The second appeal was then included in the Petitioners' attempt to appeal to the New York Court of Appeals. That appeal was dismissed by the Court of Appeals' December 23, 2003 and April 1, 2004 orders, as being non-final, and therefore not reviewable by that court. (*See* discussion of the Court of Appeals rulings at Sections G and H, *infra*.)

interpretation of a constitutional provision. Immediately after the notice of appeal was filed, the Court of Appeals responded with a letter directing Petitioners to justify their claim of jurisdiction. Both sides filed memoranda and, on December 23, 2003, the attempted appeal was dismissed for lack of jurisdiction. Petitioners' Appendix at 1a. It is that order upon which Petitioners base this certiorari petition.

H. The Appeal By Permission Was Denied

Under New York procedure, upon dismissal of the attempted "appeal of right," Petitioners had the right to pursue a second appellate option and, on January 22, 2004, Petitioners filed a motion for leave to appeal pursuant to CPLR § 5602(a)(1). On April 1, 2004, the Court of Appeals denied the motion in all respects. *See* Respondents' Appendix at 1A.

Concerning punitive damages, Petitioners based their motion on two issues. First, they argued about the sufficiency of the evidence of Petitioners' wealth as presented at trial, and they sought to argue – for the first time in the history of this case – that wealth could not be considered as a factor in assessing punitive damages. Second, Petitioners sought to appeal on the ground that the Appellate Division had failed to apply the "guideposts" set forth by this Court "for independent proportionality review of punitive damage awards." *See* Petitioners' Motion for Leave to Appeal to the New York State Court of Appeals at 7.

THE JAPANESE DECISIONS

In what can only be described as one final improper litigation tactic, Petitioners defy the rulings of the Appellate Division and the New York Court of Appeals and ignore the rules of this Court, by including in their petition claims regarding Japanese litigation which are not in the record and which were expressly excluded by the lower courts from the record. *It is not through inadvertence that the Petitioners repeated reference to the Japanese litigation contains no citation to the record.*

First, such matters should not be considered by this Court because the outcome of the Japanese litigation is not, and has never been, a part of the record in this action. These claims,

and the effort to improperly inject these matters into the record, were made before, and rejected by, the trial court, the Appellate Division and the Court of Appeals. *See* note 5, *supra*. Second, as was previously argued to, and decided by, the trial court, the Appellate Division and the Court of Appeals, the outcome of the Japanese litigation is not relevant to the malicious prosecution case. Even if Petitioners had preserved the issue for appeal, which they did not, the malice inherent in initiating and continuing the baseless underlying Takara International case remains. Using the New York litigation for their ulterior motives was malicious regardless of the success or failure of the parties in other disputes. Finally, Petitioners' statements omit reference to other cases in Japan in which Mitsuhiro prevailed and a case which is still pending.

THE PETITION MUST BE DENIED BECAUSE THE ORDER APPEALED FROM IS NOT FINAL

The December 23, 2003 order from the New York Court of Appeals, from which the petitioners based their appeal, is not a final order and, therefore, this Court cannot grant the petition for certiorari.

To be reviewable by the Supreme Court,

> a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) (quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); MOORE'S FEDERAL PRACTICE, § 406.03.

The Supreme Court lacks jurisdiction if the petitioner fails to ask the state high court to review the decision, even if further review is discretionary. *Stratton v. Stratton*, 293 U.S. 55 (1915).

The finality requirement rule serves several ends:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota St. Bd. of Pharm. v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

In this case, the appeal to the Appellate Division resulted in the unanimous October 21, 2003 decision. Pet. Appx. at 4a-7a. Petitioners "appeal of right" pursuant to CPLR § 5601(b)(1) was dismissed by the order of December 23, 2003, (Pet. Appx. at 1a-3a), and it is from that order Petitioners have appealed to this Court. On January 22, 2004, however, Petitioners filed a motion with the New York Court of Appeals seeking leave to appeal to that court pursuant to CPLR § 5602(a)(1). That motion was pending at the time the petition was filed.

A decision from the New York Court of Appeals that dismisses a CPLR § 5601 appeal is a dismissal for lack of jurisdiction.[6] It is not a final order of New York's highest court, where the Petitioners have either failed to pursue the "appeal by permission" option or where the "appeal by permission" option has not been decided by the Court of Appeals as of the time the petition is filed. *Gotthilf v. Sills*, 375 U.S. 79 (1963). *See also* MOORE'S FEDERAL PRACTICE, § 406.04[1][b].

At the time the certiorari petition was filed, there was not a final order in the case. Petitioners' motion seeking leave to appeal, which was pending at the time Petitioners filed this certiorari petition, is more than sufficient evidence that the December 23, 2003 order was not, and is not, final. Finality is

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6. Petitioners admit that the dismissal was on jurisdictional grounds. "The Court of Appeals dismissed the appeal on the jurisdictional ground . . ." Pet. Appx. at 6a (¶10).

determined as of the time the certiorari petition is filed. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942)[7]

Accordingly, because the December 23, 2003 order of the New York Court of Appeals was not, and is not now, a final order, the petition for certiorari must be denied.

IF THE PETITION IS CONSIDERED ON ITS MERITS, A WRIT SHOULD BE DENIED

The amount of punitive damages awarded in this case was amply justified by the malicious conduct of the Petitioners, whose conduct was found to be particularly reprehensible by every judge who has reviewed the facts. The ratio of punitive damages to actual damages is less than 4:1. The amount of punitive damages is less than 3 times the amount Petitioners spent in legal fees pursuing the underlying malicious prosecution, and, the Petitioners' actions were motivated by personal malice.

Petitioners argue that the Appellate Division did not give them a *de novo* review of the punitive damage award and "failed to consider" this Court's decisions, but that position is demonstrably false.[8] The judgment was reviewed *repeatedly* in accordance with this Court's decisions and it fully comports with due process.

The first "review" actually occurred *prior to the verdict*, when the trial judge, on his own initiative, modified the standard New York jury instruction to reflect appropriate U.S. Supreme Court precedent. (Petitioners did not object to the instruction, which allowed the jury to consider wealth.) The second review came on post-trial motions, when the trial

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7. Petitioners do not argue that any of the narrow exceptions to the finality rule apply. If the New York Court of Appeals had granted Petitioners' motion for leave to appeal, it would have conducted a review of the judgment that is nearly identical to the review sought by the Petitioners in this appeal. Thus, none of the exceptions to the finality rule would be applicable.

8. For example, Petitioners admit that, in their appeal to the Appellate Division, they raised the due process arguments and relied upon the "constitutional guideposts" set forth in *BMW*, *Cooper*, and *State Farm*. Pet. at 6 (¶ 9).

judge made a substantial reduction in the award. A third review came in the Appellate Division, which reviewed the facts and precedent, and in a unanimous decision, adjusted the award accordingly. A fourth and fifth review occurred in the Court of Appeals: one on the first attempted appeal "as of right," and another on the attempted appeal by permission.

These reviews have certainly satisfied the requirements of "due process" and, thus, the writ should not be granted.

ISSUE I.

The Appellate Division Fully Considered The Proportionality Of The Harm Suffered By Respondent And The Amount Of Punitive Damages

Although Petitioners repeatedly assert that the "Appellate Court failed to consider" a particular point, what they actually mean is that the courts below considered these precise points and disagreed with the Petitioners' arguments. In their briefs to the Appellate Division, both sides cited, discussed and relied upon the U.S. Supreme Court decisions, including the decision in *State Farm*. Oral argument before the Appellate Division focused almost exclusively on the U.S. Supreme Court precedent.

The Appellate Division cited to, and relied upon, the very precedent from this Court that the Petitioners argue was "not considered." It is clear that the Appellate Division took a fresh look at the case and the guideposts outlined by this Court. In an application of that precedent, the Appellate Division concluded that, consistent with due process, the facts of this case warranted an increase in the amount of the punitive damages in order to achieve the purposes of punitive damages – punishment and deterrence. That amount fits easily within this Court's guidelines.

This Court's decisions have held that "due process" entitles Petitioners to a "review" of the jury's punitive damage award in accordance with the guidelines set down in those cases. *State Farm*, 123 S. Ct. at 1520 (citing *Cooper Industries*, 532 U.S. at 424.). In *State Farm*, the Court discussed its second guidepost as articulated in *Gore* – that punitive damages must

have some proportional relation to the compensatory damages. The results in this case are well within the Court's guidelines for proportionality.[9]

Nothing in any of this Court's decisions involving punitive damages requires the imposition of a specific ratio of punitive to compensatory damages. The Court stated that a ratio of punitive damages to compensatory damages should probably involve single digit numbers, but it refused to establish a particular ratio, (no "bright line ratio" (quoting *Gore*) and "no rigid benchmarks," *State Farm*, 123 S. Ct. 1513, *quoting Gore*, 517 U.S. at 582). It stated that a ratio of more that 10:1 would be suspect, but left open the possibility of higher ratios in cases with facts appropriate to a higher ratio. The *State Farm* decision cited *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), with approval, and that case involved a punitive award of 4 times the compensatory damages.

As noted in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (cited as authoritative in *State Farm*), it is difficult if not impossible to create an objective standard for punitive damage awards, based on intra-jurisdictional and inter-jurisdictional comparisons in civil cases. "Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* Of all the Supreme Court cases which have issued opinions on punitive damages, the most closely analogous facts are those in *TXO*, in which this Court held that the "dramatic disparity between the actual damages and the punitive award" was not controlling because the "petitioner set out on a malicious and fraudulent course." *Id.*

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and

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9. Petitioners *inflate the ratio*, repeatedly stating that the ratio is "almost five times compensatory damages. In fact, the compensatory damages in this case total $3,871,680, thus, the ratio of punitive damages to compensatory damages is 3.87:1.

> petitioner's wealth, . . . the award was [not] so "grossly excessive" as to be beyond the power of the State to allow.

Id. So too, in this case, each of those factors were present and mean that the punitive damage award in this case is not grossly excessive.

By their very terms, the orders of both the trial court and the Appellate Division expressly applied the "proportionality" factor to the facts of this case in making their determinations. Pet. Appx. at 4a-7a. Moreover, this guidepost factor was incorporated into the jury instruction, as to which the petitioners did not object. RA2115-16. Thus, not only the reviewing courts but even the jury applied this factor. In this case, the ratio of punitive damages to *actual* damages is *less than* 4:1, and thus the award of punitive damages made by the Appellate Division is well within the proportionality guidelines and does not in any way run afoul of *State Farm.*[10]

In the underlying action, Petitioners prosecuted Mitsuhiro and tied up his capital in baseless litigation in New York for two and one half years. There was ample evidence of malice supporting the jury's verdict, including evidence of the reasons why Petitioners engaged in the litigation: they wanted to call Mitsuhiro a thief; they wanted to oust him from his long-held position with the family businesses; and, they wanted to prevent him from having access to his funds for living and contesting Petitioners' actions in New York and elsewhere. Petitioners spent far more in attorneys' fees than the amount

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10. In considering the "ratio", one must first decide what is being compared. The "single digit" ratio assumes punitive damages compared to actual damages. The proportionality guidepost, however, refers to "*actual or potential* harm suffered by plaintiff." *State Farm*, 123 S. Ct. at 1520. The jury instruction in this case, to which the Petitioners did not object, also required the jurors to consider both *actual and potential harm* caused to the plaintiff when assessing the amount of punitive damages. Resp. Appx. at 6A. It simply makes no logical sense to require the jury to consider both actual and potential harm but then limit the appellate court's review to only the actual harm suffered. In this case, directed as those acts were at one individual, the potential harm was extremely high, both economically and emotionally.

in controversy. As Respondents argued to the Appellate Division, the amount of punitive damages is approximately three times the amount Petitioners willingly spent in legal fees to conduct their malicious litigation. Thus, to be a deterrent to future misconduct, the punitive damages must exceed what Petitioners willingly and maliciously paid.

ISSUE II.

The Appellate Court Properly Considered The Relationship Between The Punitive Damages and Comparable Sanctions

Under the *Gore* and *State Farm* guidelines, "comparability" is the third of the three guideposts to be considered by the reviewing court. Petitioners cannot reasonably claim that this issue was not "considered." The parties fully briefed this issue for the Appellate Division and at oral argument, the Appellate Division judges questioned Petitioners' counsel and scoffed at Petitioners' position – the same as advanced to this Court – that a factually irrelevant administrative penalty might apply. The Appellate Division addressed this issue and, gave this argument the attention they deemed it deserved.

There Is No Applicable Civil Penalty

In most of the punitive damages cases addressed by this Court, a state statute has imposed a penalty for the type of misconduct that was the subject of the lawsuit, e.g., consumer protection statutes or insurance regulations. In this case, however, there is simply no civil or criminal penalty that is applicable or to which a valid comparison may be made. To allow for a valid comparison, Petitioners would need to cite to a civil or criminal penalty for maliciously suing a relative on three continents, in groundless litigation, over many years, tying up his funds, using the litigation to call him a thief, causing him to spend inordinate funds on his defense to regain the possession of money attached and restrained through the improvident bringing and prosecution of a civil action.

The "statutes" relied upon by Petitioners (22 NYCRR §§ 130-1.1 and 130-1.2) are not legislative enactments. Rather, the references are to court rules, which are the New York state

equivalent of Rule 11 of the Federal Rules of Civil Procedure. Like other court rules, the provisions of Rule 130-1 were promulgated by the Office of Court Administration under the authority delegated to the Chief Administrator of the Courts. N.Y. Court Rules of Chief Adm'r, § 130-1.1. Nothing in this Court's decisions suggests that court rules constitute "civil penalties" for purposes of the *Gore* guideposts. In fact, the State of New York has not legislated a penalty that would apply in this case. Moreover, because the underlying case was litigated in the U.S. District Court for the Southern District of New York, to the extent any court rule would apply, it would be Federal Rule 11, not New York's state court rules. Contrary to Petitioners' arguments, Rule 11 allows for the imposition of sanctions without imposing a dollar maximum. Most importantly, Rule 11 sanctions were imposed in this case, in an amount agreed to by the parties, and the agreement specifically allowed Mitsuhiro to pursue a tort claim for malicious prosecution and damages. Given the terms of the agreement, Petitioners cannot now be permitted to rely on the agreement to limit damages, which they expressly agreed could be sought against them in this action. In terms of due process considerations, Petitioners were well aware, at the time they entered into the sanctions agreement, that a malicious prosecution case would be filed and that there was a potential for substantial punitive damages.

If the New York court rules are to be considered for comparison, then the dollar limitation is *not* $10,000 as Petitioners state, but rather the sanction is up to "$10,000 *for any single instance of frivolous conduct.*" 22 NYCRR § 130-1.2. "Frivolous conduct" is defined to include conduct which is without merit; is undertaken for delay, to prolong the case, to harass or with malice; or which asserts false statements of material fact. 22 NYCRR § 130-1.1(c). Given the conduct of the Petitioners in the underlying case and the express findings of Judge Sprizzo at the conclusion of the underlying trial, each day of the underlying proceeding must be deemed to be a separate "instance of frivolous conduct." Calculated over the duration of the underlying litigation, the maximum permissible sanction, not counting costs and attorneys fees,

would be more than $9 million. (That calculation would still not include appropriate sanctions for other instances of malicious conduct on the part of the Petitioners during the course of that case, and there were many.) The comparison is still not valid, however, because the scope of the sanctions imposed by the court rule is much narrower than the factors that Petitioners agreed could be considered by the jury in imposing punitive damages. For example, the court rule only considers "actual" harm caused by the frivolous conduct while the agreed upon jury instruction permitted the jury to consider both "actual and potential" harm caused by the misconduct.

There Are No Comparable Cases

As previously stated, this Court noted in *TXO, supra,* that it is difficult if not impossible to create an objective standard for punitive damage awards "because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* at 443. This precise argument was echoed by the Appellate Division at oral argument.

In the cases cited by Petitioners (Pet. at 11), none is remotely similar to this case, and, thus, comparisons of punitive damages from other cases are not helpful.[11]

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11. The cases cited by the Petitioners at Pet. p. 2, n.2, add nothing to their arguments. First, a review of the facts in those cases quickly shows that none are even remotely similar to the facts in the case at bar. All of the cited cases involve claims asserted against large corporations stemming from cost-saving measures. None of the corporate defendants intentionally directed its energies and resources against one, specific individual with the intent to causing harm. Second, unlike the instant case, all of the cases cited by Petitioners were decided by the State high court *before* this Court's decision in *State Farm* and, thus, it was appropriate for this Court to grant the petition, vacate the ruling and remand for consideration of the impact of the *State Farm* opinion. That procedure, however, would make no sense in this case because the parties fully briefed the *State Farm* decision at both the Appellate Division and the Court of Appeals. Finally, and perhaps most importantly, it is instructive to note that in those cases where the lower court has already reviewed the case *after remand*, in each case, the ratio of compensatory damages to punitive damages, following remand, was *greater than* the ratio allowed by the Appellate Division in the Honzawa case.

The fact that the jury's decision is the highest in New York (as Petitioners claim without citation); or that the amount approved by Judge Gammerman is the highest amount he has ever permitted; or that the Appellate Division, on reflection, increased the amount of the punitive damages Judge Gammerman had upheld, simply comports with the view of Judge Sprizzo that this is the worst case of malicious prosecution he had seen. Similarly, the fact that this malicious prosecution stemmed from a civil case, rather than a criminal case, is an argument which Petitioners made to the jury, but which is inappropriate at this stage of the litigation.

The trial court and the Appellate Division properly analyzed and weighed the facts in accord with the established holdings of this Court in *Gore* and *State Farm*.

ISSUE III.

The Appellate Court Properly Considered The Appropriate Factors In Reviewing The Reprehensibility Of Petitioners' Conduct

Petitioners' claim that the reviewing courts did not consider "reprehensibility" is utterly without merit. Reprehensibility was the central factor in the papers filed by both sides in the post-trial motions and in the Appellate Division. *See, e.g.*, Brief for Respondents at 26-27, 26 note 17; Reply Brief for Respondents at 10-12. By their very terms, the orders of both the trial court and the Appellate Division expressly applied this factor to the facts of this case in making their determination.[12] Pet. Appx. at 6a. This factor

12 This Court's decisions do not dictate that the "reprehensibility" factors are exclusive and preclude consideration of other relevant factors in a particular case. In this case, it was appropriate for the reviewing courts to consider the fact that Hirokuni attacked his own brother, who was also his business partner of 30 years. The reviewing courts also properly considered the fact that Hirokuni's actions stripped Mitsuhiro of his life's work, which, for a successful Japanese businessman was, essentially, social and economic homicide. While the "reprehensibility factors" refer only to "physical" and "economic" harm, in this case, there was obviously a large

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was also incorporated into the jury instruction, as to which the Petitioners did not object. RA2115-2116. (Resp. Appx. 6A.)

After 30 years of working together as partners, Hirokuni turned against his own his brother. To say that Mitsuhiro was stabbed in the back is something of an understatement. It is incredible that at this stage of the litigation, Petitioners are still arguing the facts, and as they do so they grossly misrepresent the evidence.

Obviously, if the jury awarded more than $2 million in emotional distress damages and loss of consortium damages, then the harm could not possibly be merely economic as Petitioners argue. So too, while Petitioners portray this as a "business dispute," malice and reckless disregard were *elements* of the tort which the jury found to exist and the appellate courts affirmed.

The evidence was clear that Hirokuni and his family members were making a malicious, reprehensible attempt to drive Mitsuhiro from the family business so they could terminate his position in the companies and gain an advantage in the ownership dispute in Japan. Despite Hirokuni's knowledge regarding the true origin of the Hong Kong money, and despite the fact that there were no records connecting Takara International to the Hong Kong money, the Petitioners alleged in the underlying litigation that Mitsuhiro had stolen money that belonged to Takara

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(Cont'd)
component of "emotional harm," and the reviewing courts could properly consider that factor in evaluating reprehensibility. Finally, unlike any other punitive damages case reviewed by this court, Petitioners willingly paid more than $5 million in legal fees to prosecute the underlying action – more than double the amount in dispute. If that were not sufficiently reprehensible, most of the legal fees were incurred *after* Petitioners' lawyers had concluded that there was no evidence to support the claims asserted in the underlying case. Whether these facts are considered as "additional factors" or are fit under the factors already set forth by this Court would not seem matter. What is important is that the reviewing courts considered the entire record, including these facts, when reaching their conclusions.

International. RA2155. At the time the underlying suit was initiated, Takara International had almost no assets and had not been active as a business for nearly a decade. RA1342. The financial statements of Takara International *never* showed accounts or other assets in Hong Kong. RA1628-32, 1095. The Takara International federal and state tax returns never showed any foreign accounts and never showed any income or depreciation from any asset in Hong Kong. RA1629-30.

At the time of the money transactions in Hong Kong in the late 1970s or early 1980s, Hirokuni's sons, Masahiro and Yukihiro, were only 10 or 11 years old. RA1183, 1207. Yet as part of the lawsuits, Yukihiro and Masahiro filed false affidavits — attesting to the allegations about the financial transactions and claiming to have personal knowledge of those transactions — in order convince a judge to attach Mitsuhiro's funds in New York and Liechtenstein. RA2163, 1756-57, 2330, 968, 984, 1066. Their sworn testimony in the affidavits said that Mitsuhiro had stolen money from Hong Kong. Yet Yukihiro subsequently admitted, however, that he had no personal knowledge of the events that underlie the case. RA1252, 1193. Neither Yukihiro, Masahiro, nor any of the Petitioners made any attempt to investigate the claim before filing suit and before seeking the attachment. RA1247. No documents showed that Takara International owned the disputed funds. RA1240, 1244, 1246. Moreover, Yukihiro had met with the family friend in Hong Kong prior to filing suit and learned that the friend disagreed with their claims. RA1217-18, 1184, 1221.

Uncontradicted evidence showed that after Mitsuhiro withdrew his half, Hirokuni withdrew most of the rest, taking the funds in his name and the name of a company he controlled. The money was never put into a Takara International account. RA1586-87. The evidence showed that he essentially gave his half of the money to his sons, who put it in a numbered Austrian account and then a secret Cayman Islands account. RA1586-87.

The irony is that, to justify their own misconduct, Petitioners accused Mitsuhiro of being a thief. Indeed, even as recently as the malicious prosecution trial, Yukihiro still testified that Mitsuhiro had stolen money from Takara International and that act had been the reason for the underlying malicious lawsuit. RA1182. He also testified that Mitsuhiro would have remained in the company except for the commission of his "evil acts." RA1198. Thus, the deceitful, malicious litigation was clearly reprehensible, was clearly designed to harm Mitsuhiro, and the malevolence and the deceit continued right on through the trial of this case and has continued through the appeals. In terms of reprehensibility, the criteria set forth in *State Farm* were appropriately considered in the context of this case.

It is important to note, nonetheless, that the facts in the cases considered by this Court, were quite different from the instant case. In *Gore* and *State Farm*, for example, cases, the facts typically show corporate cost-saving measures gone awry and in no case were those measures directed at one particular individual. Nor did any of this Court's cases involve facts suggesting that the defendant willingly spent millions of dollars persecuting a particular individual, as the Petitioners did in this case. In this case, the Petitioners used their substantial wealth to prosecute groundless litigation, using the litigation to call Mitsuhiro a thief, drive him from the family business and impoverish him. These factors have led all jurists who have reviewed this case to uniformly and unanimously conclude the conduct was reprehensible.

The petition continues to reargue fact-findings already made by the jury and reviewed by the trial court, and the Appellate Division. Petitioners continue to argue that their conduct was not reprehensible: despite Judge Sprizzo's observation at the underlying trial that it was the worst case of malicious litigation he had seen; despite the jury's award of $50,000,000 in punitive damages; despite Justice Gammerman's conclusion that a $10,000,000 award was warranted; and despite the Appellate Division's *de novo*

review, its reiteration of reprehensibility, its reliance on U.S. Supreme Court precedent and its assessment that $15,000,000 is the appropriate amount.

Out Of State Conduct Was Properly Considered

Petitioners' arguments regarding out of state conduct are no less lacking in merit. They attempt to characterize the damage as damage to reputation outside the United States, an utter mischaracterization of the matters in issue. (The out-of-state conduct, to which the Petitioners refer, is described in the briefs filed with the lower courts. *See, e.g.*, Brief for Respondents at 2-5, 11-18, 26-27.) In essence, Hirokuni used the allegations that Mitsuhiro had "embezzled" from the family businesses and the resultant lawsuit filed against him in New York, as a pretext by which they could convince other family members and business and banking associates in Japan and New York that he should be ousted from the family businesses.

Petitioners fail to point out, however, that such "out-of-state evidence" *either* was presented during the trial from the Petitioners' own testimony without objection by their counsel *or* came from documents and testimony elicited by their own counsel. Thus, the issue was not proper, nor was it preserved for appeal at either the Appellate Division or the New York Court of Appeals. Thus, the issue was not preserved for review before this Court. The petition fails to cite any point in the record that would show that Petitioners raised any objection to this evidence.

Even if it were presumed that the issue was preserved for appeal, it would be appropriate to consider such evidence under this Court's holdings. In *State Farm*, this Court expressly *allowed* the consideration of out-of-state conduct as part of the review of punitive damages.

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have

> a nexus to the specific harm suffered by the plaintiff.

State Farm, 123 S. Ct. at 1523.

In this case, there was a direct and undeniable nexus between the malicious prosecution in New York and the Petitioners' actions in Japan. The damages awarded against Petitioners were directly related to the tortious conduct in New York. The portion of the verdict for attorneys' fees was limited to fees incurred by Respondents in defense of the underlying New York action. The portion of the verdict for emotional distress and loss of consortium was, by the express terms of the jury instruction, limited to damages directly related to the malicious prosecution and not activities in Japan. RA2112-14. Petitioners did not object to these instructions and did not request any alternative instructions.

Reprehensibility is the most important of the three guideposts established by this Court for review of punitive damages. That factor was presented to the jury for determination and was thoroughly considered by the trial judge and the Appellate Division. Petitioners demonstrate no reason why this Court should consider it again and, thus, there is no basis for granting the writ.

ISSUE IV.

The Appellate Court Properly Considered Evidence Of Petitioners' Financial Condition In Increasing Punitive Damages

Petitioners still do not seem to grasp that punitive damages were not imposed because Petitioners are wealthy, but rather because Petitioners used their immense wealth to facilitate their malicious purposes.

Petitioners' arguments must be rejected because Petitioners did not preserve this point for appeal in the state court and the evidence of wealth was properly admitted and considered by the reviewing courts.

The Issue Was Not Preserved For Appeal

Petitioners did not preserve this point for an appeal in the state courts, and thus did not preserve the point for appeal to this Court. The petition includes no citations to the record to prove that this issue was preserved for appeal. In fact, Petitioners did not object when the evidence of the value of the Honzawa family business came into evidence and Petitioners approved the jury instruction that indicated wealth could be considered. Petitioners never disputed that there was a legally sufficient basis for the jury's determination on punitive damages.

Summary of Evidence of Wealth

Petitioners' repeated assertions that Respondents did not present evidence of wealth are absolutely false. There was ample evidence of the worth of the companies from which the jury and Appellate Division could, and did, fashion a reasonable amount of punitive damages to punish defendants and deter others from acting in similar fashion. Despite their protestations about the evidence of wealth, Petitioners never submitted any countervailing evidence of Petitioners' immense wealth and did not challenge the evidence when it was presented by Respondents.

At trial, Mitsuhiro testified, without an objection, challenge or contradiction by Petitioners, that the gross asset value of the companies was ¥500 billion, with ¥160 billion in debt. RA1325-27. Thus, the companies had a net value of ¥340 billion or roughly $3.4 billion. The companies had gross annual profits of ¥8.5 billion (or approximately $85 million). RA1321. Testimony was presented that the U.S. companies own four large commercial office buildings in Manhattan, including the former Mobil Oil building, as well as an office building in Chicago and one in Los Angeles. RA1079, 1081, 1087.

Mitsuhiro also testified that in 1995 when he was ousted from the companies, the companies had substantial liquid assets, including bearer bonds worth $50 million and the

proceeds of a 150 Million Swiss Franc loan, which gave the companies access to ready cash. RA1366, 1507-09. Though Respondents dispute the claim, Hirokuni purports to be the sole owner of these businesses. *See*, Petition at ii.

Thus, the punitive damages award is approximately one half of one percent of Hirokuni's and the companies' net worth and a small percentage of the companies' annual profits. That is not excessive punishment.

In addition to evidence of net worth, the jury heard that Petitioners had spent approximately $5 million (and probably closer to $7 million) for legal fees in prosecuting the underlying Takara International case. Most of this money was spent *after* Petitioners' counsel had filed papers in the Takara International case admitting that Petitioners could not prevail in the action.

Evidence of Wealth Was Properly Considered By Reviewing Courts

The arguments Petitioners make to this Court merely repeat those made to, and rejected by, the lower courts. The trial court and the Appellate Division both agreed that there was sufficient competent evidence of the Petitioners' wealth to be considered by the jury in assessing the appropriate amount of punitive damages. Petitioners falsely claim that Justice Gammerman found that no evidence of wealth had been presented, but his decision clearly stated that "there was testimony concerning the substantial assets of defendants in 1995, when the underlying litigation was initiated, . . ." with a footnote which cites the same pages of the trial transcript (RA1326-27 and RA1321) referenced above.

Contrary to Petitioners' arguments, this Court's opinion in *State Farm* did not prohibit consideration of a defendant's wealth as a factor in assessing punitive damages, particularly where the defendants did not object to the introduction and consideration of the evidence. Rather, in *State Farm*, this Court quoted Justice Breyer's concurring

opinion in *Gore*, noting that the use of wealth in determining punitive damages is *not* "unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility' to constrain significantly an award that purports to punish a defendant's conduct." *State Farm*, 126 S. Ct. at 1525. In this instance, the Appellate Division specifically noted that Petitioners' conduct was reprehensible, and thus, the Petitioners' wealth was not substituted for "reprehensibility."

The Appellate Division noted that the Petitioners' wealth allowed them to use millions of dollars (between $5 million and $7 million) to pursue malicious litigation against his brother to gain advantage in the family business. It was *this evidence* to which the Appellate Division referred as one reason the amount of the punitive damages should be increased to $15 million. (Plaintiffs had argued that punitive damages in an amount three times the legal fees voluntarily incurred by Petitioners were a reasonable amount.) Stated simply, if a defendant is sufficiently wealthy that $5 million can be thrown away on a case that cannot be won, it is obvious that a punitive damages amount must be significantly higher in order to make the defendant notice the punishment. Finding that the purposes of punitive damages – punishment and deterrence – were not satisfied by the trial court's award, the Appellate Division increased the award to $15 million – an amount 3 times what the Petitioners wasted on litigation costs and, still, only 30% of the amount the jury thought was appropriate.

Given the failure of the Petitioners to object to the introduction of evidence concerning the wealth of the Petitioners, and given the failure of the Petitioners to object to the jury instruction which permitted consideration of the Petitioners' wealth in assessing punitive damages and considering the facts of this case as reviewed by the lower courts, the writ of certiorari should not be granted on this basis.

CONCLUSION

The underlying facts of this case have now been heard by two experienced trial judges – Judge John Sprizzo in the U.S. District Court and Justice Ira Gammerman, in the New York Supreme Court – and have been reviewed by five members of the Appellate Division panel, and examined on two occasions by the Court of Appeals. All have concluded that, under the guidelines of this Court, these facts constitute an extreme case of malicious prosecution and warrant substantial punitive damages.

In their briefs filed with the trial judge and with the Appellate Division, Petitioners cast the verdict as the product of an "inflamed" or a "runaway" jury (Brief for Petitioners, RA2504) and they continued to make the same arguments to the Court of Appeals and to this Court, now claiming the jury was "ignited." Petition at 5. This argument ignores an obvious fact: every judge who has reviewed this case has come to the same conclusion, as did the jury, that Petitioners' actions in filing and prosecuting meritless litigation against a family member for more than two years were reprehensible.

Contrary to Petitioners' claim that the Appellate Division did not consider this Court's guidelines, in fact, the Appellate Division reviewed the entire record and concluded that, given the amount of money spent by the Petitioners on attorneys' fees in the underlying litigation allowed by the Petitioners' enormous wealth, $15 million in punitive damages was consistent with this Court's due process guidelines and necessary to effectuate the purpose of punishment and deterrence.

To this day, Petitioners still have not apologized or shown any remorse for their conduct. During the malicious prosecution trial, Petitioners continued to argue that Mitsuhiro was a thief, continued to claim both that the funds were Takara International assets and that it was proper for them to have so claimed, despite all rational evidence to

the contrary. They even attempt in the current petition to argue that the underlying case was based on a "belief" that funds of Takara International, Inc. had been misappropriated and they continue to refer to the disputed money as "corporate funds," despite full knowledge of the evidence to the contrary. Most importantly, they still have failed to acknowledge that the litigation was part of an orchestrated ouster of Mitsuhiro from the family business so that Hirokuni and his sons could push their uncle out of the family businesses.

Petitioners cite no compelling reason why this Court should entertain the appeal, except that Petitioners seem to desire this Court to establish itself as a substitute jury and as a substitute for the lower appellate courts, thus causing this Court to become the final fact finder for every disgruntled punitive damage defendant.

Wherefore, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of April 2004.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-14 Mo. No. 109

Mitsuhiro Honzawa, *et al.*,

Respondents,

V.

Hirokuni Honzawa, *et al.*,

Appellants,

Yoshiko Honzawa, *et al.*,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, be and the same hereby is dismissed upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

/STUART M. COHEN/
Stuart M. Cohen
Clerk of the Clerk

SUPREME COURT OF THE STATE OF NEW YORK
County of New York: Trial Term Part 27

Index No. 98-602983
March 20, 2002

Mitsuhiro Honzawa and Yukiko Honzawa,

Plaintiffs,

– against –

Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation,

Defendants.

Before:

Honorable Ira Gammerman, Justice.
and a Jury

[RA2111]

COURT'S CHARGE

* * *

We now have two items of damage relating to noneconomic claims. If a lawsuit is started maliciously without probable cause, and under the circumstances of this case since there was an attachment, and since the lawsuit ended in favor of [RA2112] the party who was sued, that party has the right to recover not only the legal fees that were incurred or expended in defense of that lawsuit, but the emotional injury for emotional distress, which I called emotional injury caused by the institution of the lawsuit.

The plaintiff, Mitsuhiro Honzawa, testified as to being - as to his emotional reaction. You have to determine, because we have to distinguish between emotional distress resulting from the estrangement from the family, which apparently began six months or so before this lawsuit started, and emotional distress caused by economic reversals which are unrelated to the lawsuit. Economic reversals based on the estrangement from the family and this litigation and dispute that apparently is being litigated in a number of Japanese actions related to the entitlement to the two brothers to various aspects of the business.

That is not part of this case, and if you can make a distinction from the testimony of Mitsuhiro Honzawa, and I guess his wife testified as well concerning that, if you can make a distinction concerning the impact of this lawsuit, the underlying lawsuit and the emotional distress that caused, and isolate that from the emotional distress caused by the family estrangement and economic reversals, then you [RA2113] make an award for an amount you think is fair and reasonable to compensate him for that emotional distress; if you conclude that the evidence in the case justifies such award and enables you to make such calculation.

* * *

[RA2114] Now, in addition to awarding damages that we call compensatory damages, the plaintiffs are seeking what we call punitive damages. And you are permitted to – you are not required to obviously, but you are permitted in case in which you conclude, because if you're answering these questions, you conclude that there was action taken maliciously, that is, action taken by ill will or action taken with reckless disregard of the rights of Mitsuhiro Honzawa, you can, if you wish, award punitive damages.

[RA2115] The purpose of the punitive damages is not to compensate for injury, it is to punish for this malicious conduct. And therefore, to discourage others, and the defendant, from acting in a similar way.

An act is wanton and reckless when it's done in a way and under such circumstances as to show a conscious indifference and utter disregard of its effect upon the rights of another person.

An act is malicious when it's done deliberately with the knowledge of the rights of another person with the intent to interfere with those rights. And this is what is alleged in the underlying case, the case for malicious prosecution.

And if you answered question one in the affirmative, you have already concluded there was malice.

If you conclude under all the evidence in this case that punitive damages should be awarded, you answer the question yes. If you conclude that punitive damages are not to be awarded, you answer the question no. If you answer the question no, you skip the next question.

If you answer the question yes, question seven asks you to set forth the amount of the punitive [RA2116] damages. And there is no exact rule by which you decide that amount. You may award punitive damages in such an amount as, in

your judgment and discretion, you find will punish the defendant[s] for what they did and will deter them and others from acting in a similar way.

In arriving in a decision with respect to the amount of punitive damages, you can consider the following factors: The nature and reprehensibility of what was done by defendants, that would include the character of the wrongdoing, how long it went on, the defendants' awareness of what harm the conduct caused, and was likely to cause, the actual and potential harm that was created by the defendants' conduct.

The amount of punitive damages should bear a reasonable relationship not only to the actual harm that the plaintiff suffered, or may suffer in the future, but also the potential harm that was created by that conduct that you can consider, of course, the defendants' financial condition, and the impact that your punitive damage award will have on the defendant or the defendants.

Now, assuming you are awarding punitive damages, you indicate that amount with respect to question seven.

New York County Clerk's Index No. 98-602983

COURT OF APPEALS
State of New York

Mitsuhiro Honzawa and Yukiko Honzawa,

PLAINTIFFS-RESPONDENTS,

— vs. —

Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation

DEFENDANTS-APPELLANTS.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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APPENDIX A

SUMMARY OF FACTS SHOWING LACK OF PROBABLE CAUSE

There was ample evidence to support the jury's finding that the underlying case was initiated and continued without probable cause. In their motion, petitioners repeat many of the same arguments they made to the jury during the trial, which were the same arguments that were made to, and rejected by the trial court and the Appellate Division in both appeals. As Justice Gammerman concluded, "it seems to me there was clearly a factual issue and there was certainly sufficient evidence for the jury to answer [Question 1 on the verdict form] as it did." RA2151.

Both of the Honzawa brothers testified that they took considerable sums of cash (Japanese Yen) to Hong Kong in the late 1970s or early 1980s. This was a stipulated fact during the underlying trial. Mitsuhiro testified that he and his brother each took personal money, in the form of cash, from Tokyo to Hong Kong in the 1970s.

> Q. Mr. Honzawa, can you explain to the jury how the money got to Hong Kong.
>
> A. It's cash. And my brother and I took it to Hong Kong as cash, and we both actually took it there physically.
>
> The Court: When?
>
> A. It was during the '70s.
>
> Q. Whose money was it that was taken?
>
> A. It was money belonging to both of us.

Q. Personal money?

A. Yes.

* * *

Q. Did this money have any connection whatsoever to Takara International?

A. Not at all.

Q. Who took the money to Hong Kong?

A. Primarily myself. I actually took it over there five or six times and Hirokuni actually carried it over maybe two or three times.

RA1300-01, 1305. Once the money arrived in Hong Kong, it was deposited to an interest bearing account at Tokai (Toke) Bank. RA1306.

Without any supporting citation, petitioners continue to claim that Mitsuhiro testified that the money he withdrew from the Hong Kong bank account in August 1995 was "at least in part, deposited by Takara International." (Petitioners' Motion at 11) This claim, which they made to the jury, the trial court and the Appellate Division, was *never* supported by any evidence. In their brief to the Appellate Division, petitioners made this same claim and included a citation, but the page of the transcript cited by petitioners' brief did not in any manner support their position. (Similarly, the claim that the petitioners' position was supported by their expert witness is false. The petitioners' testimony actually supported Plaintiffs' position. See summary of testimony set forth below.)

It is a gross misrepresentation of the record for petitioners to claim, as they still do in the instant motion, that somehow the underlying claim was not malicious because Hirokuni believed that the money in the Hong Kong account was an asset of Takara International. There was *no* evidence to support this assertion and, in fact, all of the evidence is to the contrary. Hirokuni admitted that he was aware of cash transactions going directly from Tokyo to Hong Kong. RA1570. "In cash, I gave him about 40 million or 50 million yen in the beginning of the 80s." RA1569-70. This occurred two or three times and involved 30 or 40 million yen each time. RA1570. Hirokuni claims he never transported the money himself, but "gave it to [Mitsuhiro] to transport for [him]. RA1571. Mitsuhiro took the cash to Hong Kong with Hirokuni's knowledge. RA1571. According to Hirokuni, the cash transfers were not a secret. RA1573.

> Q. What happened to the cash?
>
> A. I asked him to take it and to send it. After that, I don't know. After that, he's the one that did everything, so I am not going to — I didn't want to ask him too deeply about it.

RA1575. But, Hirokuni was familiar with deposits of the cash to the Tokai (Toke) Bank in the name of Chen (RA1571) and when asked, "Where is the money now?" admitted that it was from these cash accounts that Mitsuhiro had transferred his money to the Bank in Liechtenstein account in August 1995. RA1576.

Mitsuhiro took half of the funds in Hong Kong because it was his personal money. RA1453. There was no connection between Takara International and the cash that the Honzawa brothers took to Hong Kong. RA1343. Mitsuhiro had the financial ability to have this amount of money in Hong Kong, because he was receiving an annual salary of approximately $550,000 plus benefits, including a home, a car and travel expenses. RA1303-04.

The Honzawas used some of the cash and interest earned on the cash to purchase certain shops in Hong Kong. RA1345. The shops in Hong Kong were held in the name of Mr. Chen, but were owned by the three men (Hirokuni, Mitsuhiro and Chen) in the form of a partnership by the name of Hang Wing Investments. RA1343. There was no connection between Takara International and the shops. RA1347. The rent receipts from the shops went to an interest account in Hong Kong. RA1345.

Hirokuni testified that whoever owns the shops owns rent received from the shops (RA1560) and that the shops were owned by Hang Wing. RA1561, 1590. Takara International did not have an ownership interest in Hang Wing. RA1589. Thus, both of the Honzawa brothers admitted that the cash that they had taken to Hong Kong and rent derived from the shops, had no connection to Takara International. (As will be shown in the summary of testimony from defendant's expert accountant, the cash, interest on the cash, plus rent received from the shops, totaled more than $5 million and Mitsuhiro transferred less than half of that in August 1995.)

None of the bank accounts in Hong Kong were in the name of Takara International. RA1358. Only one Hong Kong bank account had been in the name of

Takara International. RA1349. That account had been used only for the "circle loan" transaction on one day in November 1978. RA1349. See Note 2, *supra*. There had been no other transaction in the Takara International account. RA1351. The obviousness of this fact had been highlighted by Judge Gammerman who stated as a fact during the trial, to which the petitioners did not object, that the only transaction involving a Takara International account occurred on November 10, 1978. RA1495. That transaction left only a few hundred dollars in Hong Kong and could not have been the source of the funds transferred by Mitsuhiro in August 1995.

Hirokuni was well aware that the funds in Hong Kong could not have been assets of Takara International. Hirokuni looked at the bankbooks when he was in Hong Kong (RA1353) and he discussed the contents of the bankbooks with Mitsuhiro. RA1353, 1359. Hirokuni never had problems obtaining records from Mr. Chen. RA1360. Hirokuni never indicated that the money in Hong Kong was an asset of Takara International (RA1359) nor did he ever indicate that the money belonged to one of the other family companies. RA1359.

Hirokuni was also well aware that Takara International had no assets in Hong Kong. Each year Arthur Anderson prepared Takara International financial statements (RA1335) but none showed any assets in Hong Kong. The Takara International financial records were shared equally with Hirokuni (RA1337) and Hirokuni reviewed the financial statements of the U.S. companies. RA1337. As of 1990, Takara International had almost no assets (RA1342) and no ongoing business. RA1342.

Not only did Hirokuni know of the origin of the Hong Kong funds, he also knew that the funds had no connection with Takara International. Hirokuni had full access to the Takara International financial records, the accounting ledgers, tax records, financial statements and bank statements. RA1696. Hirokuni knew in advance that the Takara International case was going to be filed in NY. RA1711. Hirokuni authorized the lawyers in NY to bring suit. RA1731. The action was taken on Hirokuni's authority (RA1711) and he did so on behalf of the U.S. companies. RA1711. Hirokuni knew when the Takara International case started that only he, Mitsuhiro and Chen had knowledge of the underlying source of the funds in Hong Kong. RA1712. Despite these facts, Hirokuni did not communicate or provide information to the U.S. lawyers in the Takara International before suit was filed. RA1712.

Before commencing the Takara International case, neither Hirokuni nor anyone else spoke with Mitsuhiro to determine the origin of the funds in Hong Kong and/or to determine if those funds had any connection with Takara International. RA1360, 1363. The fact that Takara International had no assets in Hong Kong was well known to several long time Takara International employees.[13]

In addition to the cash taken to Hong Kong, Hirokuni was aware of the interest earned on that money. Hirokuni met with Chen on occasion and when they met he had an opportunity to review Hong Kong bank records. RA1695. Hirokuni reviewed memoranda prepared by Chen regarding the Hong Kong accounts. RA1729. Based on this information, Hirokuni believed that there was $10 million in the Hong Kong accounts. RA1730. In his absence, Hirokuni admitted that he could have sent someone to review the Hong Kong records for him. RA1695, 1696.

In October 1995, before the Takara International case was filed, Hirokuni, along with his wife and Yukihiro, met with Chen in Hong Kong for several days. Each meeting lasted several hours. RA1693-96. During these meetings, they reviewed the bank documents and Yukihiro calculated with Chen the balance in the Hong Kong accounts. RA1695. From these meetings, Hirokuni and Yukihiro necessarily knew that Takara International had no accounts in Hong Kong and they could trace the origin of the funds to the cash transfers, interest earned and rent received from the shops.

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13. It was stipulated that "Elaine Lipka acted as bookkeeper for Takara International from 1973 to [1995]. She has been and currently is a trusted employee. Hirokuni Honzawa could not identify anyone with greater knowledge of Takara International's financial records." RA2229. "Elaine Lipka provided financial information regarding Takara International to the accountants, Arthur Andersen, LLP, who prepared the corporate income tax returns and financial statements on a regular basis." RA2229. The long-time general manager, Takeshi Kato, testified that he was never aware of any Takara International assets in Hong Kong. RA1095.

Yukihiro handled the discussions about how to proceed with the Takara International case. RA1713. Hirokuni never asked the US lawyers about the likelihood of success. RA1714. Nor did he asked for or receive an estimate of legal fees which would likely be incurred. RA1714. Hirokuni provided no instructions to Yukihiro for payment of fees (RA1715, 1716) and had no discussion with Yukihiro or anyone else about legal fees. RA1715-16.

Yukihiro admitted that, contrary to his affidavit which was the basis for obtaining the attachment, he had no personal knowledge the Hong Kong accounts. RA1252. The only information he received regarding the Hong Kong money came from Mr. Chen or Hirokuni. RA1193. He also had no personal knowledge of the cash transfers to Hong Kong; of course he would have been only 9 or 10 years old at the time. RA1183. (Yukihiro's date of birth is December 1, 1969. RA1207) As Judge Gammerman said during the trial *without objection or correction by the petitioners*: "What he knows, he knows what other people told him." RA1252.

Yukihiro attended the October 1995 meeting with Chen in Hong Kong (RA1217) for the specific purpose of discussing the money Mitsuhiro had transferred. RA1217. At that meeting, Yukihiro admitted that he had learned of the cash transactions from Tokyo to Hong Kong, which his father had participated in - several months before suit was filed in New York. RA1184. He also admitted that he was aware the accounts from which Mitsuhiro had transferred the funds were in the name of Chen, not Takara International. RA1228. Although several letters were generated by Mr. Chen at, and following, these meetings, Yukihiro admitted that a second letter from Mr. Chen was required because the first letter Chen had signed said that the money transferred by Mitsuhiro were "private funds." RA1221.

Following the meetings with Chen, Yukihiro was aware that the total money remaining in Hong Kong, *after*

Mitsuhiro had transferred his share, was $2.4 million.[14] RA1218. At the time the NY case was filed, Yukihiro was not aware of Toppu or Hang Wing (RA1192-93) and did not know who owned Toppu or Hang Wing. RA1193. Thus, even if he had been aware of the rent received from the shops or the loan payments by Takara International to Toppu, Yukihiro had no basis for connecting those transactions to Takara International.

Yukihiro admitted that the only Takara International cash account in 1995 was in a California bank and contained less than $100,000. RA1238. Yukihiro was not aware of any documents showing that the Hong Kong funds belonged to Takara International. RA1244. He was aware that the Takara International financial statements showed no assets in Hong Kong (RA1246) and he was aware that the Takara International U.S. tax returns did not show any Hong Kong income, even though such disclosure would have been required. RA1240. Despite knowing all of this information that was contrary to the allegations in the Takara International case, Yukihiro made no effort to speak with Elaine Lipka, Takeshi Kato or the accountants at Arthur Anderson before filing the lawsuit. RA1247.

At the malicious prosecution trial, petitioners called an expert witness, Mr. Donald Martin, presumably with the intention of confusing the judge and/or the jury with

14. This remaining balance, which petitioners claimed to be owned by Takara International, was never transferred to a Takara International account. RA1225. In early 1996, after Hirokuni had initiated the Takara International suit against Mitsuhiro, Hirokuni withdrew his half of the funds, but despite the allegations that the money was an asset of Takara International, the money Hirokuni withdrew was made payable to Hirokuni personally and to a company he formed. RA1225. Yukihiro then transferred these funds to a numbered account in Austria, which he had opened in his own name, and then transferred the money to a Cayman Islands account. RA1249-51. The money was never placed in a bank account in the name of Takara International. RA1225. No bank or tax records in the name of Takara International reflected the receipt of the money (RA1226) and no effort was made to pay past due taxes on, what they claimed to be, Hong Kong income. RA1241.

accounting sleight of hand. What occurred on cross-examination was that Mr. Martin unequivocally supported the *plaintiffs'* position. Mr. Martin testified that $2,040,000 in cash was taken by Hirokuni and Mitsuhiro from Japan to Hong Kong in the late 1970's and early 1980's.[15] RA1950. He further testified that Mitsuhiro transferred $2,272,000 in August 1995. RA1957:16-18. The total amount of cash in the Hong Kong accounts at that time – including all principal, interest, and rent receipts – was $7,286,000. RA1957:12-15. Of this total, the cash principal taken to Hong Kong plus interest earned on that cash totaled $4,296,310 in August 1995. RA1959:9-22. That amount, which indisputably was known to Hirokuni and did not have any connection to Takara International, was more than the total amount withdrawn by the Honzawa brothers. RA1959:23-25.

In addition to the $4,296,310, there was an additional $1,141,000 in rent receipts from the shops purchased by the Honzawas (RA1961:4-9) and, as to which, it was stipulated there was no connection to Takara International. RA1926-27. Thus, the cash, interest earned on the cash plus rent receipts totaled $5,437,310, (RA1957), and Mitsuhiro actually withdrew less than his fair share. Hirokuni knew that this money had no connection whatsoever to Takara International and, for that reason, transfer of these funds by Mitsuhiro could not have possibly served as evidence of probable cause.

Defendants continue to argue that there was some evidentiary basis for Hirokuni to believe that the money transferred by Mitsuhiro originated from Takara International. This argument is demonstrably false and there was *no* evidence presented at trial to support this assertion. Moreover, even if the assertion were true, it is legally irrelevant because it stands the legal standard on its head.

---

15. On direct examination, Mr. Martin and defense counsel referred to these sums as "undetermined as to sources," (RA1950) and at one point said, "I don't what the sources of those monies were." (RA1911) On cross-examination, however, he admitted the source was the cash taken from Tokyo to Hong Kong by Mitsuhiro and Hirokuni. RA1950.

(3)

No. 03-1365

Supreme Court, U.S.
FILED
MAY 4 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

—against—

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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INTRODUCTION

This case involves the unique circumstance of an appellate court *increasing* a punitive damages award from $10 million to $15 million without making an effort to "ensure both reasonableness and proportionality." Although, as Respondents assert, the constitutionality of the punitive damages award has been raised and fully briefed throughout the appellate process (Res. Br. at 8, 9, 10, 14, 17), the Supreme Court of the State of New York, Appellate Division, First Department dispensed with the "[e]xacting appellate review" this Court requires in evaluating punitive damages awards. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1525-26 (2003). The Appellate Division instead relied upon the Petitioners' purported "immense wealth" as a substitute for the proportionality and reasonableness "guideposts" this Court confirmed were the mandated elements of review in *State Farm*. (Pet. App. at 6a.) The Petitioners' purported "immense wealth" is not only baseless but also *irrelevant* in determining reasonableness or proportionality and, as this Court made clear in *State Farm*, "cannot justify an otherwise unconstitutional punitive damages award." 123 S. Ct. at 1525. The Appellate Division's refusal to apply the mandated due process guideposts and its reliance upon wealth as a surrogate for exacting *de novo* review constitutes the fundamental constitutional error that compels granting the requested writ of certiorari.

Respondents attempt to obscure the Appellate Division's fundamental error by launching into pages upon pages of purported "evidence" that the underlying action upon which this malicious prosecution action was based was part of an effort to dislodge Mitsuhiro from alleged ownership of certain Japanese companies. (*E.g.*, Res. Br. at 2, 4, 20-23.) It is this very claim to "ownership" upon

which Mitsuhiro bases his argument in favor of excessive punitive damages that the Supreme Court of Japan ruled *false*, albeit after the trial in this action was completed. More importantly, the sole "evidence" that is relevant for purposes of this appeal in the first instance is the Appellate Division's decision, which is *silent* concerning whether its punitive damages award is proportional to compensatory damages, *silent* concerning whether its punitive damages award is fair compared to other similar awards and penalties, and *silent* concerning the elements of reprehensibility this Court "instructed" the lower courts to apply in *State Farm*. 123 S. Ct. at 1521.

Because the Appellate Division failed to conduct the *de novo* "guidepost" review mandated by *State Farm*, and because the $15 million punitive damages award is excessive, as detailed in the Petition, the Court should grant the requested writ of certiorari.

THE ORDER APPEALED FROM IS FINAL

Respondents contest the Court's jurisdiction on the ground that at the time this Petition was filed from a final order dismissing Petitioner's appeal to New York State's highest court, the Petitioner had filed a request for permission to appeal to the same court and the request was still pending. (Res. Br. at 11.) Respondents' assertion is incorrect and should be rejected.

Under the Civil Practice Law & Rules of the State of New York, appeals to New York's Court of Appeals concerning substantial constitutional questions may proceed in two manners. An appeal may be filed as of right; and an appeal may proceed with the Court of Appeals' permission. N.Y.C.P.L.R. 5601, 5602. Here, Petitioners filed an appeal as of right to the Court of Appeals on the

ground that the Appellate Division's punitive damages award was unconstitutional under the Fourteenth Amendment. (Pet. App. 37a.) The Court of Appeals dismissed the appeal on the ground that the punitive damages award did not constitute a "substantial" constitutional question. (Pet. App. 1a.) The order dismissing the appeal was a final order upon which this Court may now exercise jurisdiction. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 138 (1986) ("In the absence of positive assurance to the contrary from the [state's highest court], we consider that court's dismissal of [Petitioner's] appeal to be a decision on the merits.").

Furthermore, while the motion for permission to appeal to the Court of Appeals on both state common law and constitutional issues was pending at the time the present Petition was filed, the motion for leave has since been denied. (Res. App. 1A.) No further proceedings concerning the merits of this action or the matters subject to the Petition are pending in the Court of Appeals. Because events subsequent to the Petition have rendered any question concerning finality resolved, the Court has jurisdiction to hear the present appeal. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 & n.4 (1980) (finality found where post-petition events rendered the judgment on appeal final and where "no federal question, except that which we are now asked to resolve, remains in the litigation").

RESPONSE TO RESPONDENTS' OPPOSITION

1. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001), this Court made it clear that a *de novo* appellate review of punitive damages awards was a required component to ensure due process. *De novo* review in the context of the trial court's punitive damages award required the Appellate

Division to consider *each* of the guideposts declared mandatory in *State Farm* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The only "evidence" to which the Respondents point that the Appellate Division "took a fresh look" at punitive damages in this action is the fact that the constitutionality of punitive damages was a major component of the parties' briefs on appeal and the matter was "fully aired." (*See* Res. Br. at 1, 8, 14.) Nothing in the Appellate Division's decision even hints that the court considered the proportionality and fairness elements mandated in *State Farm* and *BMW* in increasing punitive damages; indeed, Respondents' conclusion the Appellate Division applied the due process guideposts simply because they appeared in the parties' briefs is speculative.[1]

2. Rather, the principal factor to which the Appellate Division pointed in determining to increase punitive damages was the Respondents' purported wealth—a factor objectionable for the reasons set forth in the Petition. (Pet. App. at 6a.) Respondents contend that the Appellate Division's consideration of wealth is irrelevant because "Petitioners did not preserve this point for appeal in the state courts . . . ." (Res. App. at 26.) To the contrary, Respondents raised the Petitioner's alleged financial condition as a basis upon which the Appellate Division should increase punitive damages in their briefs on appeal, to which Petitioners responded and objected

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[1] The purpose of *de novo* review is not only to protect the party subject to punitive damages from a "decisionmaker's caprice" but also to ensure uniformity in the law and notice to citizens of the conduct adjudged appropriate for a punitive sanction. *Cooper*, 532 U.S. at 436. Setting forth the bases for determining whether a punitive damages award comports with due process is an important appellate component of *de novo* review. The Appellate Division left the parties to speculate whether it considered any of the guideposts declared in *BMW* and *State Farm*.

in the Appellate Division under *State Farm*. (Pet. App. at 41a.) Respondents themselves also concede that the issue of the Petitioners' wealth as a basis upon which an appellate court may increase punitive damages was raised on appeal in the Court of Appeals. (Res. Br. at 10.) Moreover, even had Petitioners failed to raise the impropriety of basing punitive damages upon wealth in the state courts—which they did not—the fact that the Appellate Division addressed and resolved the issue suffices to preserve it for this Court's review. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (declaring "the elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided") (quotation omitted).

In any event, Respondents are unable to point to a single shred of evidence showing the Petitioners' alleged financial condition at the time of the jury's verdict—underscoring the arbitrary manner by which the Appellate Division arrived at its decision to increase punitive damages. The purported and baseless "evidence" of wealth on which Mitsuhiro relies was rejected by the trial court. (Res. Br. at 27.) Justice Gammerman was correct in concluding not to consider wealth as a material factor in determining punitive damages as a matter of evidence because Mitsuhiro *failed* "to submit evidence of defendants' current financial status." (Pet. App. 30a.) The Appellate Division thus ignored the trial court's factual finding that no evidence of the Petitioner's alleged wealth had been submitted, and substituted its own speculation, without evidence and contrary to the evidence and the law as declared in *State Farm*.

Respondents next attempt to downplay the Appellate Division's reliance upon wealth by spinning it as a statement that the Petitioners could afford the amount of lit-

igation costs involved in the underlying action. (Res. Br. at 27-28.) Respondents' interpretation is contrary to the Appellate Division's decision, which states that the "immense value" of the businesses was a principal factor in increasing punitive damages. (Pet. App. at 6a.) The Appellate Division's reliance upon alleged wealth in this manner was directly contrary to *State Farm*.

Respondents also point to the jury instruction which incorporated components of the due process guideposts set forth in *BMW* as "evidence" that the same guideposts were applied at the appellate level. (Res. Br. at 7, 16.) Whether the jury considered some guideposts components is irrelevant; *State Farm*, *BMW*, and *Cooper* require appellate courts to apply the review guideposts to ensure against the arbitrary caprice of the jury. Here, the Appellate Division failed in its constitutional obligation.

3. Respondents next contend that "by their very terms, the orders of both the trial court and the Appellate Division expressly applied the 'proportionality' factor to the facts of this case in making their determinations." (Res. Br. at 16.) Absent from Respondents' opposition, however, is the point in the Appellate Division's decision that the "proportionality factor" was applied, and with good reason. As explained above, the Appellate Division's decision is *silent* concerning proportionality.

Proportionality is a critical issue in this action that was ignored by the Appellate Division. Although Respondents are correct that this Court has never established a bright line rule of proportionality to be applied in *all* punitive damages cases, the Court has made it clear that where compensatory damages are substantial a lesser ratio, "*perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). Respondents ignore this guideline in the same manner as the Appellate Division. Because

compensatory damages in this action are substantial, the punitive damages award well exceeds the outermost limits of due process particularly where, as here the Appellate Division failed to apply any of the other guideposts necessary to ensure due process.

4. Respondents next assert that because the parties "fully briefed" comparable sanctions, the Appellate Division considered comparable sanctions in increasing punitive damages. Absent again from Respondents' opposition, however, is the point in the Appellate Division's decision that the "comparability" factor was applied. Indeed, as explained above, the Appellate Division's decision is *silent* concerning comparability.[2]

The Appellate Division's silence demonstrates the error of Respondents' understanding that "all of the judges" considered the factors set forth in *BMW* and *State Farm* faulty. (Res. Br. at 17.) At one point, the Respondents even contend that the "trial judge described [the underlying action] as one of the worst cases of malicious litigation he had ever seen." (Res. Br. at 1.) The only trial level judges at issue here are New York State Supreme Court Justice Gammerman and Southern District of New York Judge Sprizzo. Justice Gammerman made no such assertion in his decision to reduce punitive damages. (*See* Pet. App. at 18a.) And the issue of malicious prosecution was not even before Judge Sprizzo; rather, Judge Sprizzo commented that damages were warranted under state law relating to an "improvident" attachment, and potentially sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Contrary to

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[2] Respondents misconstrue 22 NYCRR § 130-1.1(c) in their opposition. (Res. Br. at 18.) That Court Rule applies a sanction for the very conduct of which the Petitioners were accused—an action commenced without probable cause. Section 130-1.1(c) does not provide for daily maximum sanctions as Respondents suggest.

Respondents' assertion, Judge Sprizzo made no ruling or finding concerning malice or malicious prosecution. (Res. Br. at 20.)

5. Finally, Respondents spend pages reiterating the alleged facts underlying Mitsuhiro's alleged ouster from the Japanese companies that occurred in Japan and Hong Kong as a basis for concluding the Petitioners' acts were reprehensible. (Res. Br. at 20-23.) Respondents do not contest—because the Supreme Court of Japan has resolved the issue—that actions to remove Mitsuhiro from the Japanese companies were "lawful where [they] occurred." *State Farm*, 123 S. Ct. at 1522. Respondents' recitation of purported facts concerning actions in Japan and Hong Kong, accordingly, cannot form the basis of an increased punitive damages award.

Perhaps more importantly, Respondents' opposition, like the Appellate Division's decision, never mentions the explicit factors this Court in *State Farm* "instructed" all appellate courts to apply in determining reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or the reckless disregard of the health and safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 123 S. Ct. at 1521. Because it remains questionable whether the evidence satisfied even *one* of these factors the Appellate Division's increased punitive damages award remains "suspect" *Id.* Nothing in Respondents' opposition attempts to satisfy even one of these factors.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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